LOH ENG LEONG & ORS

v.

LO MU SEN & SONS SDN BHD & ORS

HIGH COURT MALAYA, TAIPING
VT SINGHAM J
[ORIGINATING PETITION NO: 26-1-1998]
12 NOVEMBER 2002

COMPANY LAW: *Winding up - Petition - Filing of separate petitions under ss. 218 and 181 of Companies Act - Whether allowable - Whether arising from two different causes of action - Whether barred by res judicata - Application to strike out s. 181 petition - Whether too late in the day - Companies Act 1965 ss. 181, 218 - Companies (Winding-up) Rules) 1972 - Rules of High Court 1980 O. 18 r. 19(1)(c), (d), O. 88 r. 5(h)*

WORDS & PHRASES: *'At any stage of the proceedings' - Rules of High Court 1980 O. 18 r. 19(1) - Whether to be given a purposive interpretation*

On 2 October 1998, the petitioners filed a petition under s. 218 of the Companies Act 1965 ('the Act') to wind-up the respondents ('s. 218 Petition'). Some days later, the petitioners filed another petition against the respondents, albeit under s. 181 of the Act ('s. 181 Petition'), seeking for several relief, including for the winding-up of the respondents. The respondents did not then object to the filing of the latter petition.

On 15 November 1999, Zulkefli Ahmad Makinudin J ('His Lordship') dismissed the s. 218 petition. Thereupon, the respondents applied for direction as to whether, in view of the dismissal of the s. 218 Petition, the court would wish to proceed with the hearing of the s. 181 Petition. On 21 July 2000, the court answered the poser in the positive, ruling that there was no reason for the court not to hear the s. 181 petition, since the two petitions arose from different causes of action. And thus, on 8 January 2001, hearing of the s. 181 Petition commenced before His Lordship.

The respondents participated in the hearing of the s. 181 petition. However, while hearing thereon was in progress, the respondents objected to the same arguing that it was vitiated by abuse of process. And subsequently, on 11 May 2001, the respondents applied to strike out the s. 181 Petition ('encl. 77') pursuant to O. 18 r. 19 (1)(c) and (d) Rules of the High Court 1980 ('RHC').

Enclosure 77 eventually came to be heard by the learned judge herein, whereupon the respondents argued that it was an abuse of process for the petitioners to have proceeded with the s. 181 petition after the s. 218 petition had been decided by His Lordship. It was further argued that *res judicata* would apply to bar such a hearing, and that striking out was appropriate as both the RHC and the Companies (Winding-up) Rules 1972 had not provided for procedure for such hearing. The primary issues that arose were: (i) whether the petitioners were guilty of any abuse of process; and (ii) whether encl. 77 was made too late in the day and must on that score fail.

Held (dismissing the application):

[1] The procedure for bringing an application under s. 181 of the Act is provided by O. 88 r 5(h) RHC and such application must be made by originating petition whereas the procedure for bringing a petition under s. 218 is under the Companies Winding-up Rules 1972 and such application must be made by a Winding-up Petition. Both the proceedings are entirely distinct and have no relationship to one another. (p 297 g)

[2] Section 218 generally deals with circumstances where a company may be wound up upon the court's satisfaction that to do so is just and equitable and the only remedy available thereunder is winding-up. Section 181, on the other hand, gives power to the court to intervene and make any one or more of the relief sought thereunder which may not necessarily be winding-up. The petitioners, hence, have a choice either to file a petition for winding-up pursuant to s. 218 or an originating oppression petition under s. 181 or both and proceed with the hearing even if both the petitions contain the same set of facts so long as they are for different relief notwithstanding that one of the relief contained in the s. 181 Petition is for winding-up. (pp 294 h & 295 a-c)

[2a] It must also be noted that s. 181 does not expressly limit that the same facts or complaints as alleged in a s. 218 application cannot be raised in a petition made thereunder. And, notwithstanding that there are no express statutory rules or procedures as to the mode of hearing both the petitions, the petitioners must be able to proceed with the s. 181 Petition even if they failed in the s. 218 petition which is entirely for a different relief. (pp 295 g & 196 c)

[3] The court would agree with the respondents that generally where it has been shown that an identical question in the s. 181 petition has already been decided by a competent court in the s. 218 petition, the s. 181 petition should not be allowed to be re-litigated for purpose of seeking

the same relief which has previously been dismissed. However, this is not a case where the petitioners are attempting to re-try the same issues which have been conclusively decided against them. (pp 296 d-e & 297 f)

[4] Even assuming that there was abuse on the part of the petitioners in filing both the petitions, the same ought to be apparent to the respondents either at the time when both petitions were filed and served on them in early 1998 or after the decision on the s. 218 Petition was delivered on 15 November 1999 or the latest on 21 July 2000 when the respondents sought the direction of the court. It certainly could not have been apparent only in May 2001 when encl. 77 was filed. On the facts, it was the respondents who have abused the process of the court by filing the application at such a late stage. (pp 306 e-i & 307 b-d)

[5] The respondents have not acted with due promptness and reasonable diligence and were certainly guilty of unreasonable and unexplained delay. It is too late now for them to wake up to raise the issue of abuse of process and it is also manifestly unjust to shut the petitioners out from their statutory cause of action at this stage. More so when there is an order of His Lordship given on 21 July 2000 ordering that the petition should proceed for hearing which remains unrevoked. (p 309 d-e)

[6] There was waiver and acquiescence on the part of the respondents of the rights to file this application to strike out the petition. The respondents have elected to proceed with the s. 181 Petition on its merits and impliedly had abandoned their rights to strike out when the matter proceeded for hearing. By this conduct the respondents are estopped from asserting any such right to strike out the petition. (pp 308 f-g & 309 f-g)

[7] The court's inherent power to strike out a petition under O. 92 r. 4 RHC cannot be invoked at the slightest breach of the rules. On the facts, it will be an abuse of the inherent powers to strike out the s. 181 Petition. It is also clear that the inherent jurisdiction could only be invoked where the rules, namely the RHC, do not contain specific provisions available to the respondents to strike out the petition. As O. 18 r. 19 expressly provides for such procedure, the court cannot therefore invoke the summary jurisdiction. (pp 314 b & 315 h)

[8] The words 'at any stage of the proceedings' in O. 18 r. 19 RHC must be given a purposive approach. An application to set aside on ground of irregularity shall not be allowed unless it is made within reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. (p 318 h)

Case(s) referred to:

Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1989] 1 CLJ 69; [1989] 1 CLJ (Rep) 219 HC ***(refd)***

Alliance (Malaya) Engineering Co Sdn Bhd v. San Development Sdn. Bhd [1974] 1 LNS 5 HC ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & 2 Ors [1995] 1 CLJ 461 SC ***(refd)***

Arab-Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 CA ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Ban Seng Leong Sdn Bhd & Ors v. Kong Kon Fah & Ors [1999] 2 CLJ 170 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***

Barrow v. Bankside Agency Ltd & Ors [1996] 1 WLR 257 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Brisbane City Council And Myer Shopping Centres Pty. Ltd. v. Attorney General for Queensland [1979] AC 411 ***(refd)***

Bukit Melita Sdn Bhd v. Lam Geok Hee & Ors [1996] 1 LNS 479 HC ***(refd)***

Carl-Zeiss Stiflung v. Rayner And Keeler Ltd & Ors (No 2) [1966] 2 All ER 532 ***(refd)***

Cashman v. 7 Noth Golden Gate Mining Co [1897] 7 QLJ 152 ***(refd)***

CC Ng & Brothers Sdn Bhd v. Government Of State Of Pahang [1985] 1 CLJ 235; [1985] CLJ (Rep) 45 FC ***(refd)***

Chong Choon Chai v. Tan Ghee Cheng [1993] 3 SLR 1 ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Bin Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Dato' Abdullah Hisham Bin Haji Mohd Hashim v. Sharma Kumari Shukla [1999] 2 CLJ 738 HC ***(refd)***

Dyson v. Attorney-General [1911] 1 KB 410 ***(refd)***

Eddie Lee Kim Tak v. Development Sdn Bhd & Ors [1997] 3 CLJ 894 HC ***(refd)***

Erlanger v. New Sombrero Phosphate Co [1877-78] 3 AC 1218 ***(refd)***

Gleeson v. J Wippell & Co Ltd [1977] 3 All ER 54 ***(refd)***

Goodson v. Grierson [1908] 1 KB 761 ***(refd)***

Government Of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***

Green v. Weatherill [1929] 2 Ch 213 ***(refd)***

Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***

Haggard v. Pelicier Freres [1891] AC 61 ***(refd)***

Haji Wan Habib Syed Mahmud v. Datuk Patinggi Haji Abdul Taib Mahmud & Anor [1986] 2 CLJ 115; [1986] CLJ (Rep) 149 SC ***(refd)***

Halliday v. Shoesmith And Another [1993] 1 WLR 1 ***(refd)***
Hardy v. Elphick [1973] 2 WLR 824 ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd. [1997] 2 CLJ 104 CA ***(refd)***
Henderson v. Henderson [1843-1860] All ER REP 378 ***(refd)***
Ho Yoke Kwei & Anor v. Ong Eng Hin [1997] 1 CLJ 603 HC ***(refd)***
In Re Len Chee Omnibus Co Ltd Chin Sow Lan v. Lee Chee Omnibus Co. Ltd. & Ors [1969] 1 LNS 59 HC ***(refd)***
In The Matter Of Tahansan Sdn Bhd [1984] 1 LNS 1 HC ***(refd)***
James v. Smith [1891] 1 Chancery 384 ***(refd)***
Jamir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***
Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors [1993] 1 LNS 32 HC ***(refd)***
John D'silva & Anor v. Anthony Moses [2002] 3 CLJ 534 CA ***(refd)***
Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General Of Trade Unions & Ors [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218 HC ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***
Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor [1999] 1 CLJ 1 FC ***(refd)***
Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd [1991] 2 CLJ 1634; [1991] 4 CLJ (Rep) 353 CA ***(refd)***
Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application [1994] 1 LNS 73 HC ***(foll)***
Kwality Textiles (M) Sdn Bhd v. Arunachalam & Ors [1991] 1 CLJ 12; [1991] 1 CLJ (Rep) 234 SC ***(refd)***
Ladli Parshad Jaiswal v. Karnal Distillery Co Ltd [1954] 24 Comp Cas 77 ***(refd)***
Lai Kim Loi v. Dato' Lai Fook Kim & Anor [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(refd)***
Leal v. Dunlop Bio-International Processes [1984] 1 WLR 874 (refd)
Lee Nyan Choi v. Voon Noon [1978] 1 LNS 94 FC ***(refd)***
Lee Sem Yoong v. Leong Yoong [1967] 1 LNS 81 HC ***(refd)***
Lewis & Anor v. Daily Telegraph Ltd. (No 2) [1964] 2 QB 601 ***(refd)***
Lim Seak Huat v. Malayan United Reality Sdn Bhd [1997] 5 CLJ 336 HC ***(refd)***
Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Anor [1999] 5 CLJ 510 HC ***(refd)***
Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Ors [2000] 8 CLJ 338 HC ***(refd)***
Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Anor [2002] 2 CLJ 184 CA ***(refd)***
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88 [1984] 1 CLJ (Rep) 211 FC ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Berhad v. Perdana Merchant Bankers Berhad & Other Appeals [2001] 3 CLJ 248 CA ***(foll)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd And Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7 ***(refd)***
Mensa Mercantile (Far East) Pte Ltd v. Eikobina (M) Sdn Bhd & Ors [1991] 1 CLJ 772; [1991] 3 CLJ (Rep) 287 HC ***(refd)***

Metropolitan Bank, Limited, And Anor v. Alexander [1885] 10 App Cas 210 ***(refd)***
MGI Securities Sdn Bhd v. Teong Teck Leng & Ors [2000] 5 CLJ 163 HC ***(refd)***
Nanang International Sdn Bhd v. The China Press Bhd [1999] 6 CLJ 213 HC ***(refd)***
Ng Kian Chong & Ors v. Saw Seng Kee [1994] 3 MLJ 691 ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 CA ***(refd)***
Pengiran Othman Shah B Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***
Permodalan Mbf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 MLJ 178 ***(refd)***
Puah Bee Hong & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Robert Teo Keng Tuan As Intervener) [1994] 2 CLJ 705 SC ***(refd)***
R v. Senate Of University Of Aston [1969] 2 All ER 964 (refd)
Raja Zainal Abidin Bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Re Chong Lee Leong Seng Co (Pte) Ltd [1989] 1 LNS 70 HC ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 ***(refd)***
Re Lart; Wilkinson Blades [1896] 2 Ch 788 ***(refd)***
Re Len Chee Omnibus Co Ltd Chin Sow Lan v. Lee Chee Omnibus Co Ltd. & Ors [1969] 1 LNS 59 HC ***(refd)***
Re May [1885] 28 Ch D 516 ***(refd)***
Re Senson Auto Supplies Sdn. Bhd [1987] 1 LNS 110 HC ***(refd)***
Remmington v. Scoles [1897] R 242 ***(refd)***
S Singaram v. Fong Peck Moi & Anor [1974] 1 LNS 14 HC ***(refd)***
Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia [1995] 2 CLJ 368 SC ***(refd)***
Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co. Sdn Bhd [1985] 2 CLJ 97; [1985] CLJ (Rep) 760 HC ***(refd)***
Sim Hiang Kiaw & Ors v. Lee Hoi Kim Construction Co [1985] 1 LNS 95 HC ***(refd)***
Smith v. Clay [1767] 3 BRO CC 639 N (refd)
Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 CA ***(refd)***
Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd [2000] 7 CLJ 320 HC ***(refd)***
Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener) [1995] 2 CLJ 846 HC ***(refd)***
Teguh Consolidated Sdn Bhd v. Talam Corp Bhd (Malayan Banking Bhd, Third Party) [1996] 1 LNS 508 HC ***(refd)***
Teh Chin Teh Chin Chuan & Anor v. Chuan Hong Co & Ors [1999] 1 LNS 143 HC ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 ***(refd)***
Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor [2000] 4 CLJ 152 HC ***(refd)***
Thamesa Designs Sdn Bhd & Ors v. Kuching Hotels Sdn Bhd [1993] 4 CLJ 12 SC ***(refd)***
The Lyn Country Sdn Bhd v. Eic Clothing Sdn Bhd & Anor [1996] 4 CLJ 828 HC ***(refd)***
The Motor Emporium v. V Arumugam [1933] 1 LNS 106 ***(refd)***
Thong Kim Chea v. Thong Seng & Co Sdn Bhd & Anor [1996] 1 CLJ 153 CA ***(refd)***
Tien Ik Enterprises Sdn Bhd & Ors v. Woodsville Sdn Bhd [1995] 1 LNS 99 SC ***(refd)***

Tractors Malaysia Bhd. v. Tio Chee Hing [1972] 1 LNS 157 FC ***(refd)***
Weldon v. Dicks [1878] Ch Vol X 247 ***(refd)***
Willmott v. Barber [1880] Ch Vol 49 792 ***(refd)***
Yap Ban Tick & Ors v. Standard Chartered Bank [1995] 4 CLJ 31 CA ***(refd)***
Yat Tung Investment Co. Ltd v. Dao Heng Bank Ltd. The Law Reports 1975 ***(refd)***
Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd [1996] 2 BLJ 142 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 162, 181, 181(2)(e), 218, 218(1)(f), (i), 355
Rules of the High Court 1980, O. 2 r. 2(1), O. 18 r. 19(1)(c), (d), O. 38 r. 2, O. 88 r. 5(h), O. 92 r 4

Companies Act 1981 [Aust], s. 367(3)
Civil Procedure [India], s. 151
Companies Act 1948 [UK], s. 225(2)(b)

For the petitioners - Cecil Abraham (Yee Mei Ken); M/s Shearn Delamore
For the respondents - Dato' Bastian Vendargon (Yong Nget Kim); M/s Kim & Assocs

Reported by WA Sharif

JUDGMENT

VT Singham J:
This case involves a family business and has a long history in reference to other related cases filed in this court by the petitioners against the respondents and other related applications filed by both parties. In order to arrive at a meaningful decision, it is important to trace the background, the dates, the chronology and series of events in respect of the various petitions, summons and applications filed in this court by both parties which are relevant and will assist this court when determining the respondents' application (encl. 77) to strike out the 's. 218 Petition'.

This is an application by way of notice of motion dated 11 May 2001 (encl. 77) under O. 18 r. 19(1)(c) and/or (d), of the Rules of the High Court 1980 and filed on 11 May 2001 by the respondents for the following orders:

1. for leave to file the notice of motion;
2. to strike out the originating petition No: 26-1-98 dated 8 October 1998 (encl. 2);
3. the petitioners to pay the costs of this action; and
4. such other relief as this Honourable Court deems fit and just.

3. The grounds of the application are as contained in the affidavit of the 2nd respondent which was affirmed on 8 May 2001 (encl. 78) and briefly are as follows:

1. the facts in this originating petition No: 26-1-98 and the Facts In The petition for the companies winding-up No: 28-10-98 are the same;

2. the issues to be decided are also the same;

3. the parties involved in this action are also the same;

4. since this Honourable Court had heard the Petition for the Companies winding-up No: 28-10-98 under s. 218 of the Companies Act 1965 and has made a decision on the same facts on 15 November 1999, thus the originating petition No: 26-1-98 under s. 181 of the Companies Act 1965 filed by the petitioners, is *mala fide* and *res judicata*;

5. the petitioners should not be allowed to abuse the process of the court by repeatedly filing petitions on the same facts which had already been decided.

Affidavit In Reply By Petitioners

The petitioners have opposed the respondents' application (encl. 77) to strike out the petition filed under s. 181 of the Companies Act 1965 on several grounds as contained in the affidavit in reply affirmed on 31 May 2001 by the 1st petitioner (encl. 82). The grounds raised on behalf of the petitioners in opposition to the respondents' application *inter alia* have been included under four headings, namely,

1. inordinate and inexcusable delay in filing the said application (encl. 77);

2. the respondents' application is an abuse of the courts' process and prejudicial to the petitioners;

3. the respondents have waived their right to file a striking out application;

4. the petitioners have filed an application for consolidation of the s. 181 petition and the originating petition No: 26-1-2001 (hereinafter referred to as the '2001 s. 218 Petition'.

Accordingly, the petitioners have prayed that the respondents' application (encl. 77) to strike out the s. 181 Petition should be dismissed with costs.

In reply to the petitioners' affidavit in reply (encl. 82), the respondents have filed an affidavit in reply affirmed on 11 June 2001 by the 2nd respondent (encl. 86).

In reply to the respondents' affidavit in reply (encl. 86), the petitioners have filed a further affidavit affirmed on 14 August 2001 by the 1st petitioner (encl. 91). This affidavit in reply (encl. 91) basically states that the appeal by the petitioners to the Court of Appeal against the decision of His Lordship Zulkefli Bin Ahmad Makinudin J (hereinafter referred to as 'His Lordship') on 11 September 1998 in respect of the rectification of Register under s. 162 of the Companies Act 1965 *vide* Saman Pemula No: 24-51-98 was allowed partially by the Court of Appeal on 26 July 2001 *vide* Civil Appeal No: A-02-661-98 which information and details will become apparent in the later part of this judgment.

In reply to the affidavit in reply of the petitioners (encl. 91), the respondents have filed an affidavit affirmed on 24 August 2001 by the 2nd respondent (encl. 98).

Originating Summons Under Section 162 Of The Companies Act 1965

By an originating summons dated 20 May 1998 (encl. 3) *vide* Taiping High Court originating summons No: 24-51-98(T), the petitioners filed the summons on 20 March 1998 pursuant to s. 162 of the Companies Act 1965 against the respondents for rectification of the register hereinafter referred to as the 's. 162 Summons' for the following relief:

(a) that the Register of members of the above-named company be rectified by striking out the name of Loh Eng Wah (being the 2nd respondent) therefrom as the holder of the One hundred and Sixty-One (161) shares of the said company (the 1st respondent) numbered under the Share Certificates No: 0050 to 0053 both inclusive; and

(b) that the 1st defendant (the 1st respondent company) offers to all the members of the company the purchase of the share under the Share Certificates No: 0050 to 0053 referred to in para. (a) above in accordance with art. 21 of the Articles of Association of the company; and

(c) that the costs of this application be borne by the defendants; and

(d) such other and further relief that this Honourable Court deems fit and proper.

The grounds in the 's. 162 Summons' by the petitioners was that the transfer of the aforesaid shares in para. (a) above was invalid and ineffective.

On the other hand, the respondents by a summons in chambers dated 8 June 1998 (encl. 19) and filed on 8 June 1998 in the same 's. 162 Summons' applied for the following orders:

1. the orders applied under the 's. 162 Summons' dated 20 March 1998 be dismissed with costs;

2. that in the alternative, the respondents wish to apply to this Honourable Court to invoke its powers under s. 355 of the Companies Act 1965 to validate:

   (a) that the 2nd respondent is the trustee for the 1st respondent company as stated in the Share Certificates No: 0050 to 0053 and to confirm that the 2nd respondent is the lawful trustee for the One Hundred and Sixty-One (161) shares as in the Register of members of the 1st respondent company; and

   (b) to confirm that the purchase of the One Hundred and Sixty-One (161) shares as in Share Certificates No: 0050 to 0053 from Lo Yun Kong to Loh Eng Wah (the 2nd respondent) is lawful;

3. such further relief and/or other relief as this Honourable Court deems suitable;

4. the costs of this application be borne by the petitioners/plaintiffs;

5. the grounds of the summons in chambers (encl. 19) filed by the respondents are re produced verbatim as follows:

   i. the petitioners/plaintiffs have failed to prove that this case has to or ought to be heard only under s. 162 of the Companies Act 1965;

   ii. failure by the petitioners/plaintiffs, the delay in filing the 's. 162 Summons', the nature of the relief and failure to state the following facts:

      (a) *mala fide* by the petitioners/plaintiffs;

      (b) non disclosure of material facts;

      (c) the 's. 162 Summons' is made in bad faith, jealousy and as a result, the application is "remeh dan menyusahkan";

      (d) the delay for the application for rectification and the plaintiffs have knowledge since 1996 and they are estopped.

   iii. the court to exercise its powers under s. 355 of the Companies Act 1965 to confirm the sale of the shares as lawful if this Honourable Court finds the notice which was given is not in order. The detail grounds for the summons in chambers (encl. 19) is contained in the joint affidavit for the 1st respondent company and affirmed by the 2nd respondent and Loh Mu Sen the 3rd respondent as pengerusi of the 1st respondent company affirmed on 3 June 1998 (encl. 18).

The 's. 162 Summons' and the respondents' application - Summons in Chambers (encl. 19) were heard together on 30 June 1998 as both were related to the same subject matter and under the same originating summons No: 24-51-98(T). On hearing both parties based on the affidavit evidence, His Lordship dismissed with costs the 's. 162 Summons' on 11 September 1998 and allowed prayer 1 of the respondents' application - summons in chambers (encl. 19) with costs *vide* order of court dated 11 September 1998 (encl. 37). The petitioners then filed an appeal to the Court of Appeal *vide* Civil Appeal No: A-02-661-98 against the whole of the decision given on 11 September 1998.

On 26 July 2001, the Court of Appeal allowed the appeal of the petitioners/plaintiffs in respect of prayer (a) of the 's. 162 Summons' by ordering the rectification of the Register of Members of the 1st respondent company by striking out the name of the 2nd respondent as the holder of the 161 shares of the 1st respondent company under Share Certificates No: 0050 to 0053 inclusive thereby restoring the name of the transferor in the said register. The petitioners/plaintiffs abandoned prayer (b) of the 's. 162 Summons' at the appeal (see *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Anor* [2002] 2 CLJ 184).

However, the respondents being dissatisfied with the decision of the Court of Appeal, filed an application to the Federal Court *vide* Federal Court Civil Application No: 08-56-01(A) seeking leave of the Federal Court to appeal against the decision of the Court of Appeal which was given on 26 July 2001 in respect of the 's. 162 Summons'. The application for leave by the respondents was dismissed by the Federal Court on 17 June 2002. However, the respondents who were still dissatisfied with the decision of the Federal Court had filed another application to the Federal Court under the same Civil Application No: 08-56-01(A) seeking the Federal Court to review the earlier decision given on 17 June 2002 which had dismissed the respondents' application for leave to appeal. The Federal Court however had on 19 August 2002 dismissed the application by the respondents for a review.

Winding-Up Petition Under s. 218 Of The Companies Act 1965

By a Companies winding-up petition dated 2 October 1998 (encl. 1) *vide* Taiping High Court Companies Winding-up Petition No: 28-10-98, the petitioners filed the winding-up petition on 2 October 98 against the respondents pursuant to s. 218 of the Companies Act 1965 hereinafter referred to as the 's. 218 Winding-UP Petition' for the following relief:

(a) that the 1st respondent company be wound up by this Honourable Court under s. 218(1)(f) and (i) of the Companies Act 1965 and that an approved company liquidator or liquidators nominated by the petitioners be appointed as liquidator(s) of the company;

(b) such further and other relief or order as this Honourable Court may deem fit; and

(c) that the costs of this petition be paid to the petitioners by the respondents.

Oppression Petition Under S. 181 Of The Companies Act 1965

The originating petition No: 26-1-98 dated 8 October 1998 referred to as above, (encl. 2) was filed by the petitioners under s. 181 of the Companies Act 1965 on 8 October 1998 and supported by an affidavit (encl. 3) affirmed by the 1st petitioner on 2 October 1998. This originating petition will hereinafter be referred to as the 's. 181 Petition'.

The complaints raised by the petitioners in the 's. 181 Petition' are as follows:

(1) the company's directors (other than the 1st petitioner) have exercised their powers in a manner oppressive to the petitioners;

(2) the petitioners' interests as shareholders have been completely disregarded;

(3) the company's majority shareholders have acted in a manner which was and is unfairly prejudicial to the petitioners' interest;

(4) the affairs of the company are being conducted and/or the powers of the directors of the company (other than the 1st petitioner) are being exercised in disregard of the interests of the company.

The petitioners have relied on the following headings in support of their complaints which are as follows:

(1) transfer of shares;

(2) salary;

(3) termination of the 1st petitioner's auctioning services;

(4) director's fees and remuneration;

(5) declaration of dividends;

(6) refusal to provide management accounts of the company;

(7) suspension of the 1st petitioner;

(8) removal of the 1st petitioner as signatory of banking transactions;

(9) high interest on loan given by the 2nd and 3rd respondents to the 1st respondent company.

The prayers sought by the petitioners in the 's. 181 Petition' are for the following relief:

(a) that the company be wound up under s. 181(2)(e) of the Companies Act 1965 and that an approved company liquidator or liquidators nominated by the petitioners be appointed as liquidator(s) of the company;

(b) alternatively, that the respondents be ordered to purchase the petitioners' shares at a fair value to be assessed by a firm of independent auditors, and that directions be given as to:

i. the date at which such fair value is to be assessed; and

ii. the basis on which such fair value is to be assessed.

(c) such further and other relief or order as this Honourable Court may deem fit; and

(d) that the costs of this petition be paid to the petitioners by the respondents.

The 's. 218 Winding-Up Petition' was heard on 15 October 1999 and dismissed by His Lordship on 15 November 1999 (encl. 50A) (see *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Anor* [1999] 5 CLJ 510). The petitioners have filed an appeal to the Court of Appeal against the decision *vide* Civil Appeal No: A-02-958-99 and the appeal is pending. In the meantime, it is important to state at this stage that after the decision was delivered in the 's. 218 Winding-Up Petition' on 15 November 1999, the petitioners' counsel applied to the Court to fix a date for mention for the 's. 181 Petition' in view of the decision in the 's. 218 Winding-Up Petition' but the respondents' counsel applied for a date of hearing. The court fixed a date for mention.

On 21 July 2000, the petitioners' counsel had applied orally to His Lordship if he would disqualify himself from hearing the 's. 181 Petition' since he had heard and decided the 's. 218 Winding-Up Petition'. However, on hearing both parties and having referred to the cases cited by the respondents' counsel, His Lordship ordered the 's. 181 Petition' to proceed for hearing, the details of which will be highlighted in the later part of this judgment.

Application By Petitioners To Cross-Examine The 2nd And 3rd Respondents On their Affidavits in Reply Under O. 38 r. 2 RHC 1980

In the meantime, the petitioners had earlier filed an application on 18 February 2000 by a Notice of Motion dated 18 February 2000 (encl. 28) in the 's. 181 Petition' to cross-examine the 2nd and 3rd respondents on their affidavits-in-reply under O. 38 r. 2 of the Rules of the High Court 1980.

Application By Respondents To Cross-Examine The 1st, 2nd And 3rd Petitioners Under O. 38 r. 2 RHC 1980

The respondents, themselves, had also earlier filed an application by notice of motion dated 23 May 2000 (encl. 45) to cross-examine the 1st, 2nd and 3rd petitioners in the 's. 181 Petition' in respect of their affidavit in reply under O. 38 r. 2 of the Rules of the High Court 1980.

Application By Petitioners For Stay Of The 'S. 181 Petition'

Prior to the hearing of both the applications (encl. 28) and (encl. 45), there was previously an oral application by the petitioners on 20 December 1999 to stay the hearing of the 's. 181 Petition' pending the disposal of the two appeals to the Court of Appeal which was then pending but this application for a stay was however resisted by the respondents' counsel who insisted to proceed on with the 's. 181 Petition'. The respondents' counsel had objected to the application for stay of the hearing of the 's. 181 Petition' which is the subject matter of the present application (encl. 77) on the ground that "that is an abuse of the process of the court" and that "a suit cannot be held pending over a person's head". His Lordship adjourned the matter to 21 February 2000 for mention.

On 21 February 2000, the petitioners' counsel informed the court of the petitioners' pending application (encl. 28) to cross-examine the 2nd and 3rd respondents and Lo Yoon On which had not been processed by the court as yet. However, the respondents' counsel informed the court that he will be objecting to the petitioners' application to cross-examine the two respondents on the ground that "the pleadings had already been closed and the Summons for direction has been taken out" in respect of the 's. 181 Petition'. The matter was adjourned to 26 May 2000 for hearing but did not proceed as the application (encl. 28) was not heard as yet. The matter was further adjourned to 21 July 2000 at the request of the respondents' counsel.

On 21 July 2000, by consent leave was granted to the petitioners (encl. 28) and the respondents (encl. 45) by His Lordship to cross-examine each others' deponents.

However, before the consent order was given to both the applications (encl. 28) and (encl. 45), the petitioners' counsel on the same day on 21 July 2000 sought the directions of the court as to whether His Lordship wished to proceed with the hearing of the 's. 181 Petition' in view of the fact that His Lordship had decided the 's. 218 Winding-Up Petition'. However, the respondents' counsel objected to the oral application of the petitioners to disqualify His Lordship from hearing the 's. 181 Petition' as being not in order and submitted that a formal application should be filed. The respondents'

counsel had also submitted that the petitioners' application was a delaying tactic. The respondents' counsel further submitted that the petitioners ought to know the consequences of the two 's. 218 Winding-Up Petition' and the 's. 181 Petition' as the facts, the parties and the remedies sought were the same and that the petitioners should not at this juncture apply for His Lordship to disqualify himself from hearing the 's. 181 Petition'. In reply, counsel for the petitioners submitted that on the issue of estoppel, there was no formal application filed by the respondents and that it was not true that the relief sought in both the 's. 218 Winding-Up Petition' and the 's. 181 Petition' were the same.

On 21 July 2000, His Lordship ruled as follows:

(a) there was no reasonable grounds advanced for His Lordship who heard the 's. 218 Winding-Up Petition' not to hear the 's. 181 Petition';

(b) both the 's. 218 Winding-Up Petition' and the 's. 181 Petition' arose from two different causes of action and ordered the 's. 181 Petition' to proceed.

However, the case did not proceed on 21 July 2000 and was adjourned to 19 October 2000 for hearing of the 's. 181 Petition'.

On 19 October 2000, the case was adjourned to 8 January 2001 on the application of the petitioners' solicitors. There was no objection by the respondents' counsel who was present in court on that date.

'Section 181 Petition' Proceeded With The Hearing

On 8 January 2001, the 's. 181 Petition' proceeded as scheduled with the cross examination of the 3rd respondent by the petitioners' counsel pursuant to the consent Order of this court which was given on 21 July 2000 and the case was adjourned for continued hearing to 19 March 2001. The respondents' counsel did not raise any objection to proceed with the hearing of the 's. 181 Petition'. On 19 March 2001, the case did not proceed and was adjourned to 14 June 2001 on the application of the respondents' solicitors.

In the meantime, the petitioners had earlier filed the '2001 s. 181 Petition' dated 29 January 2001 against the respondents based on fresh complaints which occurred as a result of an Annual General Meeting of the 1st respondent company held on 27 November 2000 and the Board of Directors meeting held on 8 December 2000.

Application By Respondents To Strike Out The '2001 s. 181 Petition'

Subsequently, there was also an application by way of notice of motion dated 18 April 2001 (encl. 17) by the respondents to strike out the '2001 s. 181 Petition' under O. 18 r. 19(1)(c) and/or (d) Rules of the High Court 1980 and/or under the inherent jurisdiction of the Court under O. 92 Rules of the High Court 1980. This court will not go into the grounds of this application

(encl. 17) in this judgment as towards the end of the submissions, the respondents' counsel had applied to withdraw the said application (encl. 17) as a result of which the petitioners' counsel also applied to withdraw the application (encl. 21) being the application for consolidation and both the applications were struck out by this court.

On 14 June 2001, there were originally five matters fixed for hearing namely:

(1) the continued hearing of the cross examination of the 3rd respondent in the 's. 181 Petition';

(2) an application dated 2 March 2001 by the petitioners (encl. 66) and filed on 2 March 2001 for leave to cross-examine the 2nd respondent;

(3) the application dated 11 May 2001 by the respondents (encl. 77) and filed on 11 May 2001 to strike out this 's. 181 Petition';

(4) an application by a Notice of Motion dated 18 April 2001 (encl. 17) by the respondents and filed on 18 April 2001 to strike out the '2001 s. 181 Petition' (now struck out);

(5) an application dated 28 April 2001 (encl. 21) by the petitioners and filed on 28 April 2001 to consolidate the '2001 s. 181 Petition' with the 's. 181 Petition (1998)' (now struck out).

However, the cases scheduled for hearing on 14 June 2001 did not proceed as the respondents' counsel who was present in court informed the court that he was ill and applied for an adjournment. In the meantime, by consent it was ordered that both the applications (encl. 77) to strike out the 's. 181 Petition' and the application (encl. 17) to strike out the '2001 s. 181 Petition' be heard first and that the other matters (encl. 66) for leave to cross-examine the 2nd respondent and the application (encl. 21) to consolidate both the 's. 181 Petition' and '2001 s. 181 Petition' and the continued hearing of the cross-examination of the 3rd respondent be stayed pending the outcome of both the applications to strike out the 's. 181 Petition' (encl. 77) and '2001 s. 181 Petition' (encl. 17). The case was adjourned to 30 August 2001 for hearing of both the applications.

On 30 August 2001, both the applications (encl. 77) and (encl. 17) to strike out the 's. 181 Petition' and '2001 s. 181 Petition' respectively were called up for hearing. Both parties once again confirmed that they wished to proceed with the said two applications to strike out both the petitions first and that the other matters be stayed. As scheduled, both the applications (encl. 77 and encl. 17) proceeded on and the respondents' counsel started with his submissions.

Submissions On Behalf Of The Respondents/Applicants

In submitting on both the applications (encl. 77) and (encl. 17), Dato' Bastian Vendargon leading counsel for the respondents informed the court that he will address the court on the first application being the striking out of the 's. 181 Petition' and that his submissions will also be binding on the other application by the respondents (encl. 17) to strike out the '2001 s. 181 Petition' and wherever necessary he will make additional submissions for the '2001 s. 181 Petition'.

Leading counsel Dato' Bastian Vendargon for the respondents briefly went through his written submission (encl. 96) and highlighted the salient points. He also relied on and referred to the following cases as contained in the List of Authorities (encl. 96A) of the respondents' solicitors which are as follows:

1. *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553; [2000] 1 MLJ 479
2. *MGI Securities Sdn Bhd v. Teong Teck Leng & Ors* [2000] 5 CLJ 163; [2000] 1 MLJ 354
3. *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn. Bhd. & Ors* [2000] 8 CLJ 338
4. *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn. Bhd. & Anor* [1999] 5 CLJ 510
5. *Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd* [2000] 7 CLJ 320
6. *Lee Sem Yoong v. Leong Yoong* [1967] 1 LNS 81
7. *Government Of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35
8. *Seng Huat Hang Sdn. Bhd. & Ors v. Chee Seng & Co Sdn Bhd* [1985] 2 CLJ 97; [1985] CLJ (Rep) 760
9. *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd.* The Law Reports 1975 at 581
10. *Nanang International Sdn Bhd v. The China Press Bhd* [1999] 6 CLJ 213
11. *Mensa Mercantile (Far East) Pte Ltd v. Eikobina (M) Sdn Bhd & Ors* [1991] 1 CLJ 772; [1991] 3 CLJ (Rep) 28
12. *Eddie Lee Kim Tak v. Development Sdn Bhd & Ors* [1997] 3 CLJ 894
13. *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783

14. *Dato' Abdullah Hisham Bin Haji Mohd Hashim v. Sharma Kumari Shukla* [1999] 2 CLJ 738

15. *Kwality Textiles (M) Sdn Bhd v. Arunachalam & Ors* [1991] 1 CLJ 12; [1991] 1 CLJ (Rep) 234.

16. *Tetuan J & S Holdings Sdn Bhd v. A. Karim Hasan & Anor* [2000] 4 CLJ 152

The respondents' leading counsel also submitted as follows:

(1) the 's. 181 Petition' is an abuse of the process of the Court and he relied on O. 18 r. 19(1)(c) and (d) of the Rules of the High Court 1980;

(2) notwithstanding the purported delay and participation by the respondents in various steps to the proceedings ie, that despite the fact that the respondents ought to have done or have not done diligently, this court retains its inherent jurisdiction to prevent an abuse of process or prevent the court being embarrassed;

(3) the grounds stated in the 's. 181 Petition' are the same as in the s. 218 Companies Winding-Up Petition;

(4) the doctrine of *res judicata* is relevant and applies to the 's. 181 Petition';

(5) this court has already made a finding on all the grounds in the s. 218 Companies Winding-Up Petition;

(6) the 's. 181 Petition' is *mala fide*;

(7) the 1st prayer sought in this 's. 181 Petition' is for a winding-up order and therefore it tantamounts to an abuse of the process of the court;

(8) it is the duty of all parties to bring this abuse of process to the attention of the court;

(9) the inherent jurisdiction of the court is either to dismiss the petition or to grant a stay at any stage of the proceedings and the court can on its own volition exercise its discretion to invoke the inherent jurisdiction even if there is no application for stay;

(10) the 's. 181 Petition' was there in force when the s. 218 Companies Winding-Up Petition was heard but admitted that no application was then made by the respondents to strike out the 's. 181 Petition'. However, when the s. 218 Winding-Up Petition was disposed off on 15 November 1999, the 's. 181 Petition' was adjourned for parties to take instructions after the dismissal of the s. 218 Companies Winding-Up Petition. After the dismissal of s. 218 Companies Winding-Up Petition, the 's. 181

Petition' was adjourned and the court fixed the petition for hearing. However, the 's. 181 Petition' proceeded on with the cross-examination of the 3rd respondent and later fixed for continuation of the cross-examination of the 3rd respondent;

(11) to file the 's. 181 Petition' on the same grounds and to hear it side by side with s. 218 Companies Winding-Up Petition is an abuse of process and ought to be struck out;

(12) the abuse was compounded when the 's. 181 Petition' still remained and was not withdrawn when the decision was given in the s. 218 Companies Winding-Up Petition on 15 November 1999;

(13) however, the respondents' counsel conceded when questioned by this court that no application was taken out by the respondents to strike out the 's. 181 Petition' even at the stage when the decision to dismiss the s. 218 Companies Winding-Up Petition was given on 15 November 1999;

(14) the principle of *res judicata* should be applied in the wider sense. However, if the point was not available to the parties at the time due to lack of diligence, it is not *res judicata*;

(15) if the petitioners wanted any other relief, they ought to have proceeded with the 's. 181 Petition' instead of the s. 218 Companies Winding-Up Petition;

(16) the parties cannot waive or acquiesce to abuse the process of court - inherent powers of the court are already there and parties cannot take away that right;

(17) if the petitioners had withdrawn the 's. 181 Petition' and filed the '2001 s. 181 Petition' on the new ground ie, the Annual General Meeting which was not available then with due diligence, the '2001 s. 181 Petition' can proceed and there will be no *res judicata* or **issue estoppel** in any sense;

(18) the new ground in the '2001 s. 181 Petition' is a complaint which can stand by itself and all the other grounds ought to be withdrawn or struck out and then the '2001 s. 181 Petition' can proceed;

(19) Both the applications (encl. 17) and (encl. 77) should be allowed and consequently both the 's. 181 Petition' and '2001 s. 181 Petition' should be struck out;

(20) in addition, reference is also made to two other cases namely *Lai Kim Loi v. Dato Lai Fook Kim & Anor* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 and *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor* [1999] 1 CLJ 1.

The respondents leading counsel Dato' Bastian Vendargon completed his submissions on the same day on 30 August 2001 and both the first application (encl. 77) and second application (encl. 17) were adjourned to 27 September 2001 for senior counsel for the petitioners to submit.

Infact both parties had already filed written submissions for encl. 77. The petitioners' solicitors' skeleton submissions is encl. 94 and List of Authorities is encl. 94A. The respondents' solicitors' written submission is encl. 96 and the List of Authorities is encl. 96A. The petitioners' solicitors had filed a further skeleton submission No: 2 which is encl. 103 and a further List of Authorities which is encl. 103A.

Submissions On Behalf Of The Petitioners

The continued hearing of both the applications to strike out the 's. 181 Petition' and the '2001 s. 181 Petition' proceeded on 15 August 2002 and the petitioners' senior counsel proceeded with his submission.

By written submissions (encl. 103) filed on behalf of the petitioners, senior counsel, Mr Cecil Abraham went through the submissions orally. The submissions advanced on behalf of the petitioners are briefly as follows:

(1) the filing of the 's. 181 Petition' and the 's. 218 Winding-Up Petition' is not an abuse of process to entitle the respondents to strike out the 's. 181 Petition';

(2) the general categories of which an action can be struck out for abuse of process under O. 18 r. 19(1)(d) Rules of the High Court 1980 are:

i. relitigation

ii. collateral purpose

iii. spurious claim

iv. hopeless proceedings

v. probate

vi. unless order

vii. delay

(3) the 's. 181 Petition' does not fall into any one of the above mentioned categories and is certainly not an abuse of process on the following grounds:

(a) it is the petitioners' right to file separate petitions, one being the 's. 181 Petition' and the other the 's. 218 Petition';

(b) the petitioners are legally entitled to file a separate petition under s. 181 and s. 218 of the Companies Act 1965 as these petitions are premised as separate causes of action and they provide for different relief.

(4) senior counsel Mr. Cecil Abraham for the petitioners referred to the following cases in support of his submissions:

(1) *The Lyn Country Sdn Bhd v. Eic Clothing Sdn Bhd & Anor* [1996] 4 CLJ 828

(2) *Ban Seng Leong Sdn Bhd & Ors v. Kong Kon Fah & Ors* [1999] 2 CLJ 170

(3) *Teh Chin Chuan & Anor v. Chuan Hong Co & Ors* [1999] 1 LNS 143

(4) *Lai Kim Loi v. Dato Lai Fook Kim & Anor* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61.

Mr Cecil Abraham distinguished the facts and the principles enunciated in *Lai Kim Loi*. He submitted that in Lai Kim Loi, the petitioners presented a hybrid petition which was a petition under s. 218 and rolled up with a petition under s. 181 of the Companies Act 1965 ie, a combined relief under s. 181 and s. 218 of the Companies Act;

(5) in a 's. 218 Petition', the court needs to find whether it is 'just and equitable' to wind up the company and winding-up is the only relief whereas in a 's. 181 Petition', the court needs to find whether it is "oppressive, unfair discrimination, disregard of members interest or unfairly prejudicial to grant relief to the petitioners." He submitted that the statutory relief includes:

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares of debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

He referred to the following cases:

(a) *In The Matter Of Tahansan Sdn Bhd* [1984] 1 LNS 1

(b) *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170

(c) *Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors* [1993] 1 LNS 32

(6) the remedy to buy out shares is only available in a 's. 181 Petition' and it is not a relevant consideration in a 's. 218 Petition'. He relied on the case in *Tien Ik Enterprises Sdn Bhd & Ors v. Woodsville Sdn Bhd* [1995] 1 LNS 99. He submitted that the Supreme Court in *Tien Ik Enterprises Sdn Bhd & Ors* has stated in no uncertain terms that s. 225(2)(b) of the English Companies Act 1948 as well as the s. 367(3) of the Australian Companies Act 1981 is different from our Malaysian 's. 218 Petition'. In those two jurisdictions, learned counsel submitted that the petitioners are allowed to file a rolled up petition for both s. 181 and s. 218 relief because the courts are statutorily obliged to consider alternative remedies;

(7) the High Court decision of His Lordship Abdul Aziz J (as he then was) in *Eddie Lee Kim Tak v. Development Sdn Bhd & Ors* [1997] 3 CLJ 894 and relied on by the respondents' counsel was decided *per incuriam* in view of the Supreme Court decision in *Lai Kim Loi* read together with s. 181 and s. 218 of the Companies Act 1965 and the decision in *Tien Ik Enterprises Sdn Bhd & Ors*;

(8) the issue of estoppel/*res judicata* is not applicable to separate causes of action and different issues. He referred to:

(a) *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783

(b) *Barrow v. Bankside Agency Ltd And Others* [1996] 1 WLR 257

(9) the petitioners are entitled to file separate petitions, namely, one under s. 181 and the other under s. 218 of the Companies Act as this two sections cater for distinct causes of action which consequently gives rise to different reliefs. Mr. Cecil Abraham submitted that the reliefs sought

in the 's. 181 Petition' are not available to the petitioners in the 's. 218 Petition' except for the order of winding-up. He referred to the following cases:

(a) *Lai Kim Loi v. Dato Lai Fook Kim & Anor* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61

(b) *Ban Seng Leong Sdn Bhd & Ors v. Kong Kon Fah & Ors* [1999] 2 CLJ 170

(c) *Teh Chin Chuan & Anor v. Chuan Hong Co & Ors* [1999] 1 LNS 143

(10) in response to the principal authorities relied on by the respondents' counsel on the doctrine of *res judicata* and issue estoppel, Mr Cecil Abraham distinguished the following cases with the instant case:

(a) *Tenaga Nasional Bhd v. Prorak Sdn. Bhd. & Anor* [2001] 1 MLJ 479 is a case of a repeated application by way of summons in chambers to set aside a default judgment in the same proceedings and related to the same cause of action. The doctrine of *res judicata* in its wider sense applied to the second application to set aside default judgment, albeit on different grounds. That ground could be relied upon in the first application which was heard and dismissed by the High Court and the Court of Appeal; whereas in the instant case before this court, there were separate proceedings in totality and it was filed pursuant to a specific provision in the Companies Act 1965;

(b) *Henderson v. Henderson* [1843-1860] All ER REP 378 has to be distinguished. The instant case is not a case where the petitioners have negligently or otherwise failed to bring forward their case and are seeking to have a "second bite of the cherry";

(c) *Government Of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35 where there were repeated applications by way of summons in chambers to strike out the plaintiffs' statement of claim in the same proceedings and related to the original/same cause of action.

(11) the doctrine of *res judicata* is clearly not applicable to the 's. 181 Petition' as it is a separate cause of action;

(12) there are significant changes in circumstances to the 's. 181 Petition' namely,

i. on the issue of transfer of shares, the Court of Appeal had overruled the decision of His Lordship in respect of the 's. 162 Summons'. The Court of Appeal found that the shares were transferred in contravention of the Articles of Association and ordered the share register to be rectified;

ii. by reason of the rectification of share holding, the validity of all resolutions carried during the Annual General Meeting held on 28 July 1998 and the previous directors decisions (had the petitioners been appointed directors of the company) are also in question.

(13) inordinate and inexcusable delay on the part of the respondents in filing the application (encl. 77) to strike out the 's. 181 Petition'. The application to strike out the 's. 181 Petition' must be filed at the earliest opportunity but it was not done in this case. The application to strike out the 's. 181 Petition' must be dismissed as the petition had been set down for trial. He referred to the case of:

(a) *Halliday v. Shoesmith And Another* [1993] 1 WLR 1

(b) *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773;

(14) The legal principles applicable to the respondents' application

(a) He referred to the following principles enunciated in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 in the context of a striking out application:

i. The court will only strike out pleadings in "plain and obvious cases".

ii. The striking-out procedure can only be adopted "when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'".

iii. The court cannot exercise "a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence.".

iv. At the striking-out stage, the court is not concerned with the respective merits of the claims.

v. Lastly, so long as the pleadings "disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out".

He also referred to the case of *Raja Zainal Abidin Bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606, wherein His Lordship Peh Swee Chin SCJ *inter alia* stated as follows:

> We must emphasise that for any court to reach such a similar decision on an application under O. 18 r. 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

Mr Cecil Abraham submitted that on the basis of this principle of law, all the grounds raised by the respondents should not be entertained by this court as they involve delving into contested and conflicting affidavit evidence on the merits of the application.

The respondents failed to explain the delay in filing the application (encl. 77) to strike out the 's. 181 Petition'. He distinguished the facts in the case in *Ng Kian Chong & Ors v. Saw Seng Kee* [1994] 3 MLJ 691 at 698 wherein the learned Judge accepted the reason of "difficulties in evidence gathering exercise" as reasonable excuse for delay in filing a striking out petition but he submitted this is not the case in the instant case.

The various affidavits filed in support of and in opposition to the 's. 181 Petition' clearly shows there is an extensive conflict of affidavit evidence in respect of the material complaints pleaded in the petition. Mr. Cecil Abraham submitted that the complaints raised certainly cannot be decided upon summarily as this court has not been given the opportunity to fully evaluate all the affidavit evidence and the oral testimony of witnesses given during the cross-examination pursuant to O. 38 r. 3 of the Rules of the High Court 1980.

The Abusive Nature Of The Respondents' Application

The learned counsel for the petitioners referred to the case in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Berhad v. Perdana Merchant Bankers Berhad & Other Appeals* [2001] 3 CLJ 248 and referred to the observation of the Court of Appeal wherein it is stated that:

> One of the most abused procedures adopted in winding-up proceedings is the application to strike out the petition under Order 18 r. 19 of the RHC 1980 and/ or the inherent jurisdiction of the Court.

Incidentally, it was pointed out by Mr. Cecil Abraham that an application by the appellant in *Maril-Rionebel (M) Sdn Bhd (dahulunya dikenali sebagai Kredin Sdn Bhd) & Anor* for leave to appeal against the decision of the Court of Appeal was dismissed by the Federal Court on 13 August 2001.

Mr. Cecil Abraham submitted that the respondents' application (encl. 77) to strike out the 's. 181 Petition' falls clearly within the ambit of the legal principles and judicial concerns expressed by the Court of Appeal and that the said application is essentially seeking to delay the hearing of the 's. 181 Petition' on its merit and instead is seeking to try the merits of the 's. 181 Petition' in a summary manner by way of a striking out application. He submitted that the respondents' application should be dismissed with costs on this ground alone subject to their right to canvass the same arguments at the hearing of the 's. 181 Petition'.

Respondents Waived Their Rights To File This Application

Mr. Cecil Abraham submitted that the doctrine of estoppel applies to the respondents as they had consented and infact proceeded with the trial of the 's. 181 Petition'. He referred to the following cases (encl. 94A):

(a) *Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia* [1995] 2 CLJ 368

(b) *Bukit Melita Sdn Bhd v. Lam Geok Hee & Ors* [1996] 1 LNS 479

(c) *Teguh Consolidated Sdn Bhd v. Talam Corp Bhd (Malayan Banking Bhd, Third Party)* [1996] 1 LNS 508

The respondents' application at the 11th hour is an abuse of process and is infact causing delay and prejudice to a fair trial in the 's. 181 Petition'.

Mr. Cecil Abraham submitted that the application (encl. 77) by the respondents to strike out the 's. 181 Petition' should be dismissed with costs.

Reply By Respondents' Counsel

In reply, the respondents' leading counsel submitted which briefly are as follows:

(a) whether the two petitions under s. 218 and s. 181 can be filed;

(b) whether the filing of the two s. 218 and s. 181 Petitions is an abuse of process;

(c) election to proceed with the 's. 218 Petition' to its conclusion.

Dato' Bastian Vendargon submitted that there is an abuse of process on the part of the petitioners. He said that if the 's. 181 Petition' is to proceed to its conclusion, it will be undesirable for the same High Court to make findings of facts on substantially the same grounds which had already been adjudicated.

The delay and acquiescence does not arise in this case when there is an abuse of the process of the court. Therefore, Dato' Bastian Vendargon submitted that the respondents are seeking this court to invoke its inherent jurisdiction.

The decision in *Eddie Lee Kim Tak* is not *per incuriam* and he submitted that it is not an absolute right to present two petitions under s. 218 and s. 181 of the Companies Act 1965. However, Dato' Bastian Vendargon conceded that the decision in Lai Kim Loi by implication allows the petitioners to file both the s. 218 and s. 181 Petitions separately.

Dato' Bastian Vendargon further conceded that there was no abuse when both s. 218 and s. 181 Petitions were filed as the petitioners could file both the petitions separately. However, the respondents' counsel submitted that the abuse of process came when the petitioners decided to proceed with the 's. 181 Petition' after the conclusion and the decision in the 's. 218 Petition'.

Dato' Bastian Vendargon on being questioned by this court as to when it became apparent to the respondents as to the alleged abuse of the process of the court, he replied that it only became apparent to the respondents that there was an abuse of process by the petitioners sometime in May 2001 at/about the time when this application (encl. 77) was filed to strike out the 's. 181 Petition'.

However, towards the end of his reply, the respondents' counsel applied to withdraw the respondents' application (encl. 17) to strike out the '2001 s. 181 Petition'.

The petitioners' counsel then applied to withdraw encl. 21 being the application to consolidate both the s. 181 and the 2001 s. 181 Petitions. Accordingly, this court struck out both the applications, namely, encl. 17 and encl. 21. As agreed, costs was ordered to be costs in the cause.

Since encl. 17, ie, the application to strike out the '2001 s. 181 Petition' has been struck out by this court on 15 August 2002 which was originally heard together with encl. 77 to strike out the 's. 181 Petition', the grounds of decision of this court will only be in respect of encl. 77.

Decision Of The Court

This court finds that the crux of the original arguments of the respondents' counsel is that, the petitioners cannot be permitted to file two separate petitions, one, being a petition for winding-up under s. 218 and the other being an originating oppression petition under s. 181 of the Companies Act 1965. It is submitted that if a petitioner files the two petitions separately, there is an abuse of the process of the court. Nevertheless, Dato' Bastian Vendargon towards the conclusion of his reply had with respect changed his stand where he submitted that it was in order for both the 's. 218 Petition' and the 's. 181 Petition' to be filed separately since the reliefs sought in the 's. 181 Petition' are not available in the 's. 218 Winding-Up Petition'. In other words, the

respondents have conceded that there is no abuse of the process of the court when the petitioners filed both the 's. 218 Winding-Up Petition' and the 's. 181 Petition' separately as they have the choice to do it and are not in any way prevented from filing the same in court.

In any event what Dato' Bastian Vendargon is concerned with is that there is no express provision laid anywhere in the Rules of the High Court 1980 or the Companies (Winding-up) Rules, 1972 as to the procedure if both the petitions are permitted to be filed ie, whether it should be heard separately as in the instant case or be heard together. Nevertheless, it is clear that the respondents' main complaint presently is that the petitioners are not allowed to proceed with the 's. 181 Petition' after the conclusion and the decision having been given on 15 November 1999 in the 's. 218 Petition'.

In order to comprehend and to draw a distinction between the reliefs available in both the s. 181 and s. 218 Petitions and the circumstances in which a company may be wound up by the court, it is important to consider and state the express provisions of both s. 181 and s. 218 which are as follows:

Section 218 Provides As Follows:

Circumstances in which company may be wound up by Court

(1) The Court may order the winding up if-

(a) the company has by special resolution resolved that it be wound up by the Court;

(b) default is made by the company in lodging the statutory report or in holding the statutory meeting;

(c) the company does not commence business within a year from its incorporation or suspends its business for a whole year;

(d) the number of members is reduced in the case of a company (other than a company the whole of the issued shares in which are held by a holding company) below two;

(e) the company is unable to pay its debts;

(f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members;

(g) an inspector appointed under Part IX has reported that he is of opinion:

(i) that the company cannot pay its debts and should be wound up; or

(ii) that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up;

(h) when the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, occurs on the occurrence of which the memorandum or articles provide that the company is to be dissolved;

(i) the Court is of opinion that it is just and equitable that the company be wound up;

(j) the company has held a licence under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983, and that licence has been revoked or surrendered; or;

(k) the company has carried on Islamic banking business, licensed business, or scheduled business, or it has accepted, received or taken deposits in Malaysia, in contravention of the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989, as the case may be;

(l) ...

(m) the company is being used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia; or

(n) the company is being used for any purpose prejudicial to national security or public interest.

S. 181 Remedy In Cases Of An Oppression Provides As Follows:

(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

(3) Where an order that the company be wound up is made pursuant to subsection (2)(e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

Penalty: [One thousand ringgit.] Default penalty.

This court is of the view that s. 218 generally deals with the complaints raised by the petitioners as to the circumstances where a company may be wound up by the court provided that the court is of the view that it is just and equitable. The only remedy available in a 's. 218 Petition' is winding-up and the court has no power to grant the reliefs as provided in the 's. 181 Petition'. However, in the 's. 181 Petition', the court can intervene and make any one or more of the reliefs sought as it thinks fit without an order for winding-up if the

court is of the view that either of the grounds stipulated thereon is established. In other words, the petitioners have a choice either to file a petition for winding-up pursuant to s. 218 or an originating oppression petition under s. 181 of the Companies Act 1965 or both and proceed with the hearing even if both the petitions contain the same set of facts so long as both the petitions are for different relief notwithstanding that one of the reliefs contained in the 's. 181 Petition' is for winding-up. As stated, it cannot be denied that one of the relief sought in the 's. 181 Petition' is for winding-up and is put up as a first prayer where the same relief has been dismissed in the 's. 218 Petition'. On the other hand, the fact that one of the relief sought or pleaded in the alternative in the 's. 181 Petition' is for winding-up and is put up as a first prayer does not by itself indicate expressly or impliedly that the petitioners' claim is primarily for winding-up or it converts the 's. 181 Petition' into a 's. 218 Petition' (see case *Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 CLJ 1634; [1991] 4 CLJ (Rep) 353). In any event, the petitioners cannot be prevented from exercising this statutory right which is available to them.

However, since the petitioners in the instant case have filed two separate petitions, it is desirable and a better practice that an order be obtained from the court for both the petitions to be heard together (see *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 73. Nevertheless, this application could also have been made by the respondents themselves but they too never applied for the same. On the other hand, it has been said time and time again by our superior courts that "justice is not to be sacrificed at the alter of convenience" and that any irregularity in the procedure is curable so long as there is no miscarriage of justice. It must be emphasized that courts do not exist for the convenience of one party alone but to all parties, and litigants come before the court with the true faith and confidence that justice will be done and this is the foundation on which the courts function.

On the other hand, it is important to note that s. 181 does not expressly limit that the same facts or complaints as alleged in the s. 218 cannot be raised in the 's. 181 Petition' as there are distinct statutory relief available to a petitioner. Parliament in its wisdom must have intended that a party has the choice to file two separate petitions, one under s. 218 and the other under s. 181 of the Companies Act 1965 or any one. If this court accepts the contention of learned counsel for the respondents that the petitioners having proceeded with the 's. 218 Winding Up Petition'' are not permitted to proceed with the 's. 181 Petition', then the remedies available to the petitioners under s. 181 will become redundant and that could not have been the intention of

Parliament in providing two separate avenues and two different procedures. This court is of the view that if at all there is an abuse of the process of the court as alleged by the respondents, this application should have been at least filed or raised before the commencement of the hearing of the 's. 181 Petition' on 8 January 2001 and not at this late stage and this will be dealt with in the later part of the judgment (see *Thamesa Designs Sdn Bhd & Ors v. Kuching Hotels Sdn Bhd* [1993] 4 CLJ 12 SC).

This court is of the view that notwithstanding that there are no express statutory rules or procedures as to the mode of hearing both the petitions, surely the petitioners must be able to proceed with the 's. 181 Petition' even if they have failed in the 's. 218 Petition' which is entirely for a distinct relief if they are permitted to file the two separate petitions.

Having found that the petitioners are allowed to file both ss. 218 and s. 181 Petitions, this court is in complete agreement with the contention of the learned counsel for the respondents that generally where it has been shewn that identical question or questions in the 's. 181 Petition' has been already decided by a competent court in the 's. 218 Petition', the 's. 181 Petition' should not ideally and ordinarily be allowed to be re-litigated and to seek the same relief which has previously been dismissed as if it is allowed it could amount to having a second bite of the cherry and there will be no finality to litigation. It also cannot be denied that recanvassing of the same issue all over again in another suit which has been determined by a court of competent jurisdiction in the first suit is no doubt an abuse of the process of the court as the court must maintain certainty and finality in our judicial system.

In Re May [1885] 28 Ch D 516 at 518 Brett MR said

> … it is one of the most fundamental doctrines of all courts, that there must be an end to all litigation.

In *Green v. Weatherill* 1929 2 Ch 213, Maugham J said that:

> ... the plea of res judicata is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation.

His Lordship Maugham J referred to the following statement of the law by Wigram V-C in *Henderson v. Henderson*:

> I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and **will** not (**except under special circumstance**s) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which

was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and **which the parties, exercising reasonable diligence**, might have brought forward at the time. (emphasis added).

In *Greenhalgh v. Mallard*, H.L. Vol 2 255 at 259, Evershed LJ observed:

In my view, therefore, and without the need for further analysis, if in one action for damages for conspiracy acts done in combination are alleged, it is an abuse of the process of the court, and contrary to the principle that in the public interest there should be an and to litigation which may be regarded as an extension of the strict rule of *res judicata*, to rely in the second action on the same concerted acts, even though in the first action the claim was formulated on the basis of absence of justification in the end only, without regard, or particular regard, to the means, and in the second action the means are impugned as unlawful without challenge to the legitimacy of the end or purpose. For these reasons, in addition to those given by SOMERVELL, L.J., I think this appeal should be allowed.

However, in view of the peculiar facts, the circumstances and the sequence of events in the instant case, this court is of the view that this case is an exception to the general rule and has to be distinguished as each case is decided in the light of its own set of facts and circumstances where the general principle of the law is applied.

This court finds that this is not a situation where the petitioners are attempting to re-try the same issues which have been conclusively decided against them. On the contrary, it is a case where the petitioners are permitted under the law to file two separate petitions which they have rightfully done and the procedures to be followed to obtain a hearing date are entirely separate in nature and in practise. The procedure for bringing an application under a s. 181 Petition is provided under O. 88 r. 5(h) of the Rules of the High Court 1980 and such an application must be made by an Originating Petition whereas the procedure for bringing a winding-up petition under s. 218 is under the Companies (Winding-Up) Rules, 1972 and such an application must be made by a Winding-Up Petition and both the proceedings are entirely distinct and have no relationship to one another. In *Brisbane City Council And Myer Shopping Centres Pty Ltd. v. Attorney General for Queensland* [1979] AC 411 at p. 425 Lord Wilberforce in reference to "abuse of process" said "that it ought to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation".

Again, in the 's. 218 Petition', the sole and only order is winding-up and of course, the consequential order of appointing a liquidator whereas in a 's. 181 Petition' the court is required to make a specific finding of oppression which then gives the court a wide discretion as to the relief it may grant including winding-up of the company and that option ranks equally with the others. It is therefore not correct to say that the remedy in s. 181 is winding-up because it provides a 'different species' of relief when compared to the relief available in the 's. 218 Petition' (see *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716).

In *Lai Kim Loi v. Dato Lai Fook Kim & Anor* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61, which is widely known in the legal circles in Malaysia and all those who practise company law, the Supreme Court did not at any time expressly state that a petitioner cannot file two separate petitions that is, one under s. 181 and the other under s. 218 of the Companies Act 1965. In that case, the petition was intituled as companies winding-up No: 6 of 85 and the petition combined both the reliefs available under s. 181 and s. 218 of the Companies Act. Also, the petitioners had filed a Writ of Summons and a statement of claim against the 1st respondent in which the petitioner had sought the same relief which he has claimed in prayer (i) of the petition. Further, in that case, the petitioners proceeded with the Writ of Summons but did not serve the petition until a year later. Accordingly, the Supreme Court held that there was a hybrid petition and upheld the judgment of the High Court which struck out the petition for being vexatious and an abuse of the process of the court. His Lordship Gunn Chit Tuan SCJ delivering the judgment of the Supreme Court held that:

> After consideration of the relevant provisions of our law, it could not be said that this was a case of mere non-compliance with the rules of the court which requires only amendment of the pleadings. In this case the petition presented was not in accordance with the provisions of the Companies Act 1965 itself, resulting in a petition which was, we would agree with counsel for the respondents, imprecise and which **appears to us to be a hybrid petition purporting to have been presented under two different sections of the Companies Act 19**65. (emphasis added)
>
> ... although the issues raised and the relief sought are not totally similar yet we consider that the substantial duplication of issues and relief sought in both actions amounted to multiplicity of actions and in all the circumstances of this case, the petition presented is vexatious and is an abuse of the process of the court and ought to be struck out as the learned judge has done and not stayed or the petition be allowed to be amended as suggested by counsel for the petitioner. We were satisfied that the learned judge had exercised his discretion correctly in striking out the petition and we therefore dismissed the appeal with costs.

Be that as it may, by way of anology reference should be made to the case of *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 7. This case was not cited by both parties although it is referred in some of the cases cited by both counsels. In *Kumagai Gumi Co Ltd*, there were two petitions filed by the petitioners, one was under s. 181 in Petition No: D3-26-13-91 and the other was under s. 218 of the Companies Act 1965 vide Petition No: D6-28-84-92. Both the petitions were referred by His Lordship Anuar J (as he then was) as the oppression petition and the winding-up petition respectively. The oppression petition was filed on 2 May 91. Subsequently, the petitioners obtained an *ex parte* order on 2 May 1991 in the nature of injunctions pursuant to an *ex parte* Summons in Chambers dated 2 May 1991 before His Lordship VC George J (as he then was). On 25 October 1991, the petitioners took out summons for the appointment of receivers and managers of the 1st respondent company. The said summons was dismissed on 8 September 1992 by His Lordship Anuar J (as he then was).

In the oppression petition under s. 181, there were 6 respondents which included Zenecon-Kumagai Sdn Bhd as the 1st respondent company. In the winding-up petition under s. 218, the company sought to be wound up was the 1st respondent Zenecon-Kumagai Sdn Bhd in the oppression petition.

On 4 March 1992, the petitioners filed the winding-up petition. On 25 June 1992, the petitioners obtained an order for both the petitions to be heard together. On 20 November 1991 and 3 September 1992, the petitioners took out two further summonses in the oppression petition to strike out portions of the affidavits filed by the respondents. On 23 December 1992, both the summonses were dismissed by His Lordship Anuar J (as he then was). On 2 December 1992, the petitioners took out another summons for leave to cross-examine the 3rd and 4th respondents on their affidavits filed by them in the oppression petition. On 20 April 1993, the said summons was refused by His Lordship Anuar J (as he then was). Finally, both the petitions proceeded for hearing.

In the meantime, the respondents in two of the affidavits dated 4 November 1991 and 17 March 1993 cross-petitioned for relief under s. 181 of the Companies Act 1965 against the petitioners. The petitioners objected to such course as there are no specific provisions for presentation or prosecution of a cross-petition contained in the Rules of the High Court 1980.

However, after having agreed with counsel for the petitioners that there were no such specific provisions for the presentation of a cross-petition by the respondents, His Lordship Anuar J (as he then was) still allowed the

prosecution of the cross-petition for relief under s. 181 of the Companies Act 1965 by the respondents against the petitioners pursuant to the inherent jurisdiction of the court under O. 92 r. 4 of the Rules of the High Court 1980.

On 12 October 1993, the petitioners' claim for relief under s. 181 and the winding-up petition were both dismissed. However, the 2nd, 3rd and 4th respondents succeeded on their cross-petition for relief under s. 181 and obtained seven reliefs and a further relief that the parties are at liberty to apply.

For the sake of completion, it is only appropriate to state that the petitioners had appealed to the Supreme Court (as it then was) against all the orders of the High Court which was given against them and five different appeals were registered which are as follows:

i. Supreme Court Civil Appeal No: 02-517-92 which was an appeal against the appointment of interim liquidators. This appeal was dismissed on 30.9.94 with no order as to costs;

ii. Supreme Court Civil Appeal No: 02-15-93 which was an appeal against the application to expunge affidavits. This appeal was dismissed with costs;

iii. Supreme Court Civil Appeal No: 02-242-93 which was an appeal against the refusal of the learned Judge to allow cross-examination of the deponent i.e. respondent No. 3. This appeal was dismissed with costs;

iv. Supreme Court Civil Appeal No: 02-551-93 which was an appeal against the dismissal of the 's. 181 Petition'. This appeal was dismissed with no order as to costs;

v. Supreme Court Civil Appeal No: 02-552-93 which was an appeal against the refusal of the petition to wind-up. This appeal was dismissed with no order as to costs;

vi. Re: respondents' cross-petition
this appeal was allowed and the order for relief was set aside.

It is clear from *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 73 that there is nothing in law to prevent the petitioners in the instant case from presenting two separate petitions against the respondents, one, under s. 218 and the other, under s. 181 of the Companies Act 1965 although both the petitions could preferably have been heard together (see *The Lyn Country Sdn Bhd v Eic Clothing Sdn Bhd & Anor* [1996] 4 CLJ 828. In that case, the respondents appeal to the Court of Appeal *vide* Civil Appeal Nos: W-02-91-96 and 02-92-91 were heard on 9 December 1996 and 10 December 1996 and dismissed by the Court of

Appeal (Coram: Gopal Sri Ram, NH Chan and Abu Mansor JJCA (as he then was) (see also *Teh Chin Teh Chin Chuan & Anor v. Chuan Hong Co & Ors* [1999] 1 LNS 143). In fact, in *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 73, some of the affidavits filed in the winding-up petition were by consent by the parties used in the oppression petition although the grounds were identical and common to both the petitions and there were considerable overlap between the two petitions.

In *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd And Other Appeals* [2001] 4 MLJ 187, His Lordship Gopal Sri Ram JCA for the Court of Appeal referred to several reported cases on the issue of whether it is permissible to present more than one winding-up petition and on the issue of abuse of process. His Lordship referred to *Ladli Parshad Jaiswal v. Karnal Distillery Co Ltd* [1954] 24 Comp Cas 77, where at p. 81, Dulat J, discussed the English cases on the point:

> Mr Khanna, appearing for the respondent, while admitting that two or more identical suits by the same person were maintainable even in the same court, contended that the case of winding up applications is peculiar, and that once a winding up application has been filed and it is a bona fide application, a second application of the same kind for the winding up of the same company does not lie. He was unable, however, to support this argument either on the basis of any principle of law or any authority. Mr. Khanna did refer to three English decisions, *Re Joint Stock Coal C*o [1869] LR 8 Eq 146, *Re Norton Iron Coy* [1877] 47 LJ Ch 9 and *Re Building Societies' Trust Ltd* [1890] 44 Ch D 140, but none of these afford any assistance to his argument. In these cases, the question mainly was of costs. In *Re Joint Stock Coal Co* there were two petitions for the winding up of the same company and both failed because neither disclosed any good ground for a winding up order. The learned vice chancellor disposes of the merits of the two petitions at p. 153 of the report, and then after considering another question proceeds to consider the matter of costs at p. 154 and decides:
>
> > As to the second petition, by the shareholders of Norwich, I am not sure if theirs had been the original petition for winding up that I should have dismissed it with costs, because they have a fair ground of complaint in the discontinuance of the Norwich depot. But when it is considered that Green's petition had already been presented, and that the Norwich shareholders well knew all that was being done, there was no excuse under the circumstances for presenting a second petition, and it must consequently be dismissed with costs.
>
> It will be noticed that the second petition was not dismissed because of the existence of the first petition. In the next case, *Re Norton Iron Company*, the

second petition was dismissed because the first was allowed, and a winding up order was made on that first petition. In the last case, *re Building Societies' Trust Limited*, again one of the petitions was allowed and the other thereupon dismissed. It is clear therefore that in none of these cases was a winding up petition dismissed merely because another winding up petition of the same kind was awaiting decision. This matter concerning the position of several petitions for the winding up of the same company was considered in *Re European Banking Company, ex p Baylis* [1866] LR 2 Eq 521 and Sir RT Kindersley VC, observed:

> However desirable it is to avoid a number of petitions being presented for the winding up of a company, I am not aware of any rule having been established with a view to limit the number of them. But still, every one of these petitions ought to be looked at separately upon its own merits as if it were the only petition presented.

It is not shown that this view has been departed from in the English courts. There is thus no authority for concluding that the appellant's petition for the winding up of this company is not maintainable because a previous petition by him of a similar kind is pending and has not yet been decided. On general grounds too there appear several considerations why the appellant should not be debarred from seeking his remedy in this court merely because another court of competent jurisdiction is yet considering a similar prayer by him. The company in question is admittedly an Indian company, and as from the date of the partition, the responsibility for deciding disputes, connected with its affairs, rests on this court. If therefore a party seeks relief from this court in connection with such a dispute, feeling that he can obtain effective relief from this court alone, such relief ought not to be refused on any but substantial grounds. The old maxim of law is that a judge must extend his jurisdiction, which of course does not mean that he should usurp jurisdiction where none exists, but does mean that he ought to amplify as far as possible the remedies he can grant.

There you have it. I require no clearer authority for the proposition that more than one winding up petition may be presented against a company. Of course, the provisions of r. 33 are available to a petitioning creditor. And if he does not take advantage of that rule to have himself substituted for a lethargic petitioner, he may find himself out of pocket for his costs. But on no account is his petition bad in law. Nor is it an abuse of the court's process.

Mr. Abraham sought to feebly argue that the respondent's petition comes within s. 224 of the Act. That section strikes down any attachment, sequestration, distress or execution against the assets of a company after the commencement of a winding up. And s. 219(2) of the Act deems winding up to have commenced at the time of presentation of the petition for the winding up. Counsel seeks to rely on the judgment of Lord Denning MR in *Re Overseas Aviation Engineering (GB)* Ltd [1962] 3 All ER 12 where he said:

> 'Execution' means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is 'completed' when the judgment creditor gets the money or other thing awarded to him by the judgment.

But a petition for winding up is not execution, for a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s. 218 of the Act. But the issuance of such a notice is not a *sine qua* non for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due. There are two cases that support this view.

In concurring with the decision of His Lordship Gopal Sri Ram JCA, His Lordship Abdul Hamid Mohamad JCA has this to say:

I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA, and I agree entirely with his views. However, I only wish to add a few words to further emphasize my unhappiness (and his too) about the way winding up petitions are often conducted. Indeed, what I am saying here is no more than what I have earlier said on at least four occasions when I was sitting in the High Court. Reference can be made to *Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Trading Sdn Bhd* [1999] 4 CLJ 135; *Antara Elektrik Sdn Bhd v. Bell & Order Bhd* [2000] 6 MLJ 385; *Sun Microsystems (M) Sdn Bhd v. KS Eminent Systems Sdn Bh*d [2000] 4 MLJ 565 and recently *SP Setia Bhd v. Gasing Heights Sdn Bhd* [2001] 5 MLJ 117.

As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications that would invariably stall the hearing of the petition proper. If the application is dismissed, the respondent would appeal to the Court of Appeal, or may even try to go further, further delaying the hearing of the petition. I have come across cases where even an order made by the senior assistant registrar under r. 32 of the Companies (Winding-up) Rules 1972 ('the Rules') was appealed against, and when the appeal was dismissed, the respondent further appealed to the Supreme Court - see *Asia Commercial Finance (M) Bhd v. Lum Choon Realty Sdn Bhd* Penang High Court Winding Up No 28-60-92. Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. The effect is that the hearing and disposal of the petition is delayed.

One of the most abused procedures adopted in winding up proceedings is the application to strike out the petition under O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC') and/or the inherent jurisdiction of the court. (emphasis added)

In *Buildcon-Cimaco Concrete Sdn Bhd*. I pointed out the undesirability of applying such procedure to a winding up petition.

Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s. 218 winding up petition which is more simplified and geared for speedy disposal. The Rules of the High Court 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O. 14), striking out of pleadings (O. 18 r. 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with, and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear cut cases.

The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg service, advertisement, compliance with r. 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the Rules envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.

Furthermore, more often than not, resort to O. 18 r. 19 of RHC 1980 in winding up proceedings results in the delay in the hearing of the petition. The application is usually filed one to two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.

In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

These views were reiterated in *Antara Elektrik Sdn Bhd v. Bell & Order Bhd*, this time in Bahasa Malaysia.

In *Sun Microsystems (M) Sdn Bhd*, I stressed the difference between the procedure in respect of a writ action under the RHC and a winding up petition under the Rules:

> It is important to note that the procedure in a winding up proceeding, as provided by the Companies (Winding-Up) Rules 1972, is different from

> the procedure in a writ action as provided by the Rules of the High Court 1980 ('the RHC'). In a winding up proceeding, the procedure is simple and brief. That is what it is meant to be. When a petition is filed, the senior assistant registrar gives a hearing date straightaway before the petition is issued. The petitioner is expected to do everything he or it has to do in terms of complying with the procedural requirements eg, serving, gazetting and advertising, before the hearing date. The petition is to be heard on the date fixed for hearing.

On the other hand, in a writ action, upon filing, no date (be it for hearing or for mention) is given by the senior assistant registrar. He merely signs the writ and issues it. The writ itself clearly says:

> We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for **you at the suit of … And take notice, that in default of you** so doing the plaintiff may proceed therein to judgment and execution. (Emphasis added)

The trial date is a long way off. Indeed, there may not be any at all.

It is important that the procedure applicable in a writ action should not be incorporated into a winding up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action, so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for directions and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc in a winding up proceeding.

On the other hand, had the 's. 181 Petition' proceeded and if one of the reliefs was for winding-up and was expressly refused by the court and subsequently, if the petitioners proceed to file a 's. 181 Winding-Up Petition' which has only one relief ie, an order for winding-up based on the same and identical facts and which does not contain any new development or circumstances of the 1st respondent company, then perhaps and arguably it could be a situation where the petitioners are attempting to re-litigate a matter and re-seek the same remedy which has been authoritatively decided by a court of competent jurisdiction but however this is not the situation in the instant case and needs no further consideration.

However, there is another distinguishing factor to be noted in the instant case that is, the 's. 181 Petition' was not filed after the petitioners were unsuccessful in the 's. 218 Petition' and if that was so, it could perhaps again be argued

that the petitioners are attempting to raise once again the same points which they were unsuccessful in the 's. 218 Petition' or they did not bring forward any points because they have from "negligence, inadvertence, omission or even by accident omitted part of their case". In the instant case, as this court has already mentioned both the s. 218 and s. 181 Petitions which sought or provided "different species" of remedies were filed separately and at about the same time which they are entitled to do so. The petitioners should not therefore presently be prevented from continuing with their statutory rights as provided under s. 181 of the Companies Act 1965 to which the respondents themselves had not only insisted to proceed even after the decision in the 's. 218 Petition' was given by His Lordship on 15 November 1999 but took various and positive steps so as to participate in the hearing on the merits of the 's. 181 Petition' including the hearing of the Summons for Directions and consented to the cross-examination of the 2nd. and 3rd. respondents and as a result the hearing on the merits of the 's. 181 Petition' proceeded part heard and has since been fixed for continuation (see *Sim Hiang Kiaw & Ors v. Lee Hoi Kim Construction Co* [1985] 1 LNS 95).

On the other hand, even assuming for a moment that there is an abuse of the process of the court by the petitioners as contended by the respondents' counsel, firstly, for filing two separate petitions and secondly, for proceeding with the 's. 181 Petition' after the decision in s. 218 decision on 15 November 1999, the question that arises is, was all this not apparent to any reasonable and diligent litigant in the instant case, the respondents who had the benefit of legal advise. The alleged abuse if any was apparent either at the time when both petitions were filed and served on the respondents as early as in 1998 or after the decision was delivered on 15 November 1999 in the 's. 218 Petition' or the latest on 21 July 2000 where the appellants' counsel sought the direction of the court as to whether His Lordship wished to proceed with the hearing of the 's. 181 Petition' as His Lordship has decided the 's. 218 Petition'. In the circumstances, it certainly could not have been apparent only in May 2001 when the application to strike out was filed on 11 May 2001 as submitted by learned leading counsel for the respondents. This court wishes to observe with respect and without casting any aspersions on the part of the counsels for the respondents that the party seeking the indulgence of the court to exercise its discretion in their favour must come to court with clean hands. In the instant case, it certainly cannot be true when counsel for the respondents replied to a question by this court that it became apparent to the respondents only in May 2001 at the time when the application to strike out was filed that there was an abuse of the process of the court. Incidentally, this court will not hesitate to state on the facts and the chronology of events in the instant case that it is the respondents who have abused the process of the court and this will be dealt with at the later stage in this judgment.

In order to determine whether it is an abuse of process to proceed with the 's. 181 Petition' this court must look at the whole history of this case and not just solely at the decision which was given on 15 November 1999 in the 's. 218 Petition' (see *Carl-Zeiss Stiflung v. Rayner And Keeler Ltd & Ors (No 2)* [1966] 2 All ER 532 at 572, *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211, *Lim Seak Huat v. Malayan United Reality Sdn Bhd* [1997] 5 CLJ 336 at 348). The question that arises in the instant case is, why did the respondents not apply to strike out either one of the petitions as soon as both the petitions were served on them as early as in 1998 or at least when the decision in the 's. 218 Petition' was delivered on 15 November 1999 or even before the hearing of the 's. 181 Petition' commenced on 8 January 2001 so that the petitioners and the respondents need not have taken so many various and positive steps in the 's. 181 Petition' until the cross-examination of the 3rd respondent proceeded. In fact there is absolutely no explanation advanced for this inordinate delay. If the respondents had taken the necessary steps immediately or as soon as possible to have the 's. 181 Petition' struck off for the reasons as raised presently, then the following applications and the orders of the court would have been unnecessary in the 's. 181 Petition' and which would have saved a lot of judicial time:

(1) the order given on 2 June 1999 by consent pursuant to the summons for directions (encl. 14) where the date of hearing was fixed on 11 August 1999 (see *Sim Hiang Kiaw & Ors v. Lee Hoi Kim Construction Co* [1985] 1 LNS 95);

(2) the petitioners' application on 20 December 1999 for a stay of the 's. 181 Petition' pending the outcome of the appeal to the Court of Appeal in respect of the decision in the 's. 218 Petition' which was objected on behalf of the respondents who had insisted to proceed with the hearing;

(3) the petitioners' application on 21 July 2000 for His Lordship to disqualify himself from hearing the 's. 181 Petition' since he had heard and decided the 's. 218 Petition' on 15 November 1999. In fact, the respondents' counsel insisted to proceed with the hearing of the 's. 181 Petition';

(4) the petitioners' application dated 18 February 2000 to cross-examine the 2nd and 3rd respondents in the 's. 181 Petition' which was consented by the respondents' counsel and a consent order was given by the Court on 21 July 2000;

(5) the respondents' application dated 23 May 19 2000 to cross-examine the 1st., 2nd. and 3rd petitioners in the 's. 181 Petition' which was consented by the petitioners and a consent order was given by the court on 21 July 2000;

(6) the hearing of the 's. 181 Petition' which proceeded on 8 January 2001 with the cross-examination of the 3rd respondent and with the consent of the respondents and pursuant to the consent order given on 21 July 2000;

(7) the application by one of the respondents' counsel during the hearing of the cross-examination of the 3rd respondent on 8 January 2001 who sought clarification from this court as to whether the order to cross-examine the 3rd respondent was limited to certain parts of the affidavit or its entirety whereby this court on checking the notes of proceedings confirmed that there was no limitation on the consent order to cross-examine the 3rd respondent.

All these applications and orders of this court were unnecessary and a sheer waste of judicial time and tend to show that the respondents had elected and consented to proceed with the hearing of the 's. 181 Petition' on its merits. Consequently, if the application to strike out is presently allowed, will it not by implication strike out all the orders given by this court in respect of the previous said applications. Consequently, does not the present application by the respondents to strike out the 's. 181 Petition' amount to an abuse of the process of the court. Further, if this application is allowed will it not amount to disobeying the order of court given on 21 July 2001 by His Lordship that the 's. 181 Petition' should proceed for hearing and which order still remain intact. Infact this court is unable to set aside the order of court given by its predecessor (see *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75).

Be that as it may, as this case has gone to trial it is too late for the respondents to wake up to raise the issue of the abuse of the process of the court and take a round about course based on the facts and circumstances in the instant case. Therefore, the petitioners cannot now be restricted in any manner from proceeding with the continuation of the 's. 181 Petition'. It is more so, where there is already an order of the court by His Lordship given on 21 July 2001 that the 's. 181 Petition' should proceed for hearing which remains unrevoked or set aside. Also, all the previous interlocutory orders by His Lordship in the 's. 181 Petition' have not been set aside or appealed, the respondents cannot be permitted to come into this court by the back door and apply to strike out the 's. 181 Petition' which if allowed would impliedly set aside all the said orders and will be in defiance of the order of court given by His Lordship for the 's. 181 Petition' to proceed for hearing. Further, this court is of the view that the order of His Lordship that the 's. 181 Petition' should proceed for hearing is an order which todate has a continuing effect until it is set aside. In *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd.* [1997] 2 CLJ 104 Gopal Sri Ram JCA said:

> we cannot over emphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly.

In *Puah Bee Hong @ Bee Hong (F) & Anor v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Robert Teo Keng Tuan As Intervener)* [1994] 2 CLJ 705, His Lordship Peh Swee Chin SCJ said:

> We are of the considered view that **an order** of a superior **court such as High Court**, even if it is e.g. an order obtained *ex parte* or a default judgment; **until it is set aside, must be obeyed by everyone whether its validity is challenged or not**, and His Lordship referred to the observation of Romer J. in that it is stated: (emphasis added)
>
> it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until the order is discharged, per Romer, LJ in *Hadkinson v. Hadkinson* [1952] 2 All ER 567.

In the instant case, it is the view of this court that the respondents had not acted with due promptness and reasonable diligence when taking into consideration the entire history and circumstances. The respondents are certainly guilty of unreasonable and unexplained delay in seeking the courts intervention to deny or shut out the petitioners from exerting their statutory rights which the respondents were aware and had full knowledge when both the 's. 218 Petition' and the 's. 181 Petition' was served on them as early as in 1998. It is manifestly unjust and unreasonable that the petitioners should be shut out from their statutory cause of action at this stage of the proceedings.

Waiver And Acquiescence

As to the issue of waiver and acquiescence, it cannot be denied that the respondents elected to proceed with the 's. 181 Petition' on its merits and impliedly abandoned their rights to strike out when the matter proceeded for hearing on 8 January 2001 and cross-examination of the 3rd respondent by consent. By this conduct, the respondents no doubt are estopped from asserting any such right presently to strike out the 's. 181 Petition' after having acquiesced. All this acquiescence took place over a considerable period of time and this court will not entertain stale demands especially where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court to intervene but conscience, good faith and reasonable diligence, where it is wanting, the court is passive and does nothing (see *Smith v. Clay* [1767] 3 BRO CC 639 N at 640 N).

On the facts and the circumstances in the instant case, the only reasonable inference this court could draw is that there was waiver and acquiescence on the part of the respondents of their rights to file this application to strike out the 's. 181 Petition'. Accordingly, the justice of the case demands that this court does a balancing exercise since both parties have raised the abuse of the process of the court against each other. In doing so, this court is of the view that the respondents are estopped from denying the petitioners from continuing with the cross-examination of the respondents as the respondents have on their own volition waived their rights and entered into acquiescence. In fact if the respondents take the view that the petitioners have abused the process by proceeding with the 's. 181 Petition' after the decision in the 's. 218 Petition', the respondents also should be penalised for consenting and taking various steps themselves in order to proceed with the 's. 181 Petition'. "What is good for the goose is also good for the gander".

In *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 1 CLJ 69; [1989] 1 CLJ (Rep) 219, His Lordship Edgar Joseph Jr J (as he then was) observed:

> Acquiescence
>
> The term 'acquiescence', like the term 'laches', is confusingly used in different senses. Three should be referred to: (a) it can refer to the type of estoppel of which *Ramsden v. Dyson* is an example. It is this meaning which Lord Cottenham LC in Duke of *Leeds v. Earl of Amherst* said was the primary meaning of the term. Poole J in *Glasson v. Fuller* thought likewise; (b) it can refer to an element in one of the two kinds of laches, *viz* the action of a plaintiff over a long period of time, with full knowledge of his rights, refraining from exercising his rights in circumstances where it can properly be inferred that he has abandoned them. This is waiver, affirmation, release. This is the sense in which Hanbury uses the term when he says: 'The chief element in laches is acquiescence'; (c) finally, as is evident from the question of Lord Wensleydale's speech in *Archbold v. Scully* the term 'acquiescence' can be used as referable only to the second type of laches considered in this chapter, ie the type of laches which involves prejudice to the defendant or to third parties.
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> Note: The Plaintiffs withdrew the appeal to the Supreme Court *vide* Civil Appeal No: 508 - 88 and the appeal was dismissed with no order as to costs on 2 February 94.

In *John D'silva & Anor v. Anthony Moses* [2002] 3 CLJ 534 at 536, His Lordship Gopal Sri Ram JCA said:

> The action had by then gone into case management. On 23 May 2000, that is to say some one year and two months after the issuance of the writ, the defendants (appellants before us) took out an application to strike out the statement of claim. They failed. They now appeal to us and ask us to reverse the judge.

The learned judge advanced two reasons for dismissing the application. First, he thought that he was precluded by the doctrine of *res judicata* from dealing with the point raised. In this, he fell into error. The doctrine of res judicata is not a technical doctrine. It is an illustration of the operation of equity in the field of procedure, that is to say adjectival law. Whether you call it issue estoppel, cause of action estoppel or *res judicata* matters not. A court is not to apply any of these branches of estoppel in a staccato and straightjacket fashion. **The court is bound to weigh the merits of the case and determine where justice lies**. (emphasis added)

If upon an examination of all the circumstances of the case, the court concludes that it would be unjust for a party in a given case to re-ventilate a point, or to ventilate a fresh point which he could fairly have raised in earlier proceedings, then it may no doubt be justified in coming to the conclusion that it would be unjust to permit the plaintiff to succeed. It would accordingly admit, as successful, a plea of procedural estoppel; be it cause of action estoppel, issue estoppel or *res judicata*. On the other hand, if the judge comes to the opposite conclusion on the facts, then of course, the plea of procedural estoppel may not succeed. Or to put it more accurately, the court will not permit the plea to succeed. This much is clear in the speech of Lord Upjohn in the case of *Carl-Zeiss Stiflung v. Rayner & Keeler Ltd & Ors (No. 2)* [1966] 2 All ER 532. That view of the matter was affirmed and followed by Lord Bingham of Cornhill in his speech in *Johnson v. Gore Wood & Co* [2001] 1 All ER 481. It is noteworthy that in *Johnson (ibid)*, the plea of *res judicata* was not permitted to succeed. This court has applied these cases in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321. But, for the reasons which we will state in a moment, our differing with the judge on this point produces no unfavourable consequence in the case.

That brings us to the second ground advanced by the judge. **He thought it was too late in the day, with case management nearing its tail end, to entertain the application to strike out**. Although he expressed the view that the application had merits, he refused to grant it in the exercise of his discretion. The plaintiff has since then put in an application to amend his pleading to correct the error based on which the defendants made their application. **In these circumstances, it is inappropriate for this court to enter into the merits of the application to strike out**. As we said a moment ago, this is a case involving the exercise of discretion. And the principles upon which this court acts in such matters are too well settled to merit recall. There is here no misdirection in law by the learned judge. Neither has he taken into account irrelevant considerations or omitted relevant considerations. He has not asked himself the wrong question. There is no manifest miscarriage of justice. (emphasis added).

> For the reasons already given we find it unnecessary to trouble counsel for the respondent to reply.
>
> The appeal is dismissed. **The order of the judge is upheld**. All costs here and below shall follow the event of the trial. The deposit is to be refunded to the appellant. (emphasis added)

In *Lewis & Anor v. Daily Telegraph Ltd (No 2)* [1964] 2 QB 601 at 620, Pearson LJ observed that:

> ... there is also this fact, that the defendants have acquiescenced in the position. It may be contended that they have waived any rights which they might have had.

In *Weldon v. Dicks* [1878] Ch Vol X 247, Malins VC observed:

> This Court never binds parties by acquiescence where there is no knowledge, though it is true that knowledge and acquiescence is in many cases fatal to parties. But, then, has he acquiesced to his knowledge?

On the set of facts in the instant case, this court is unable to find a worse case than the instant case where the respondents have abused the process of the court by filing this application at such late stage to strike out the 's. 181 Petition'. If this application to strike out is allowed at this stage of the proceedings after considering the background and chronology of events, it will make a mockery and bring chaos to the whole system and to the administration of justice. It cannot be again said that the process of the court must be used *bona fide* by litigants.

In *Cashman v. 7 Noth Golden Gate Mining Co* [1897] 7 QLJ 152 at pp. 153-154, Sir Samuel Griffith said:

> The term acquiescence is not a term of art. It was used in courts of equity as a term to characterize a defence which may be set up by a person against whom another makes a claim for equitable relief. **It is a well known doctrine of equity that when a person claiming equitable relief has lain for a long time and so conducted himself that it would be inequitable to permit him to complain of the defendant's actions, the court will refuse to grant the relief**. The term also bears another meaning. It may be fairly applied to a man who, seeing an act about to be done to his prejudice, stands by and does not object to it. He may be very properly said to be acquiescing in that act being done. But the difference in point of law in the legal consequences of the two kinds of acquiescence is quite clear. A man who stands by and sees an act about to do done which will be injurious to himself, and makes no objection, cannot complain of that act as a wrong at all. He never has any right of action, because he stands by and allows the act to be done. Acquiescence in the other sense is a defence to an action for specific relief, on the ground that the plaintiff cannot be reinstated in his original position without doing injustice to the defendant, but it is not an answer to a cause of action already accrued. (emphasis added)

On the facts and circumstances in the instant case, this court is satisfied that the petitioners have made out a case of acquiescence on the part of the respondents (see *Willmott v. Barber* [1880] Ch Vol 49 792).

In fact, the respondents had no doubt two alternative and mutually exclusive causes of action in relation to either proceed with the 's. 181 Petition' on its merits or to apply summarily to strike out between which they may make their election. On this issue, by their subsequent conduct and upon exercising their election to proceed, have the respondents not given the impression or led the petitioners to believe that they have relinquished the cause or option open to them ie, to apply to strike out the 's. 181 Petition'. In all fairness to the petitioners, this court finds the respondents who had the benefit of legal advice have made their choice and cannot afterwards be allowed to resile from their election and to the detriment of the petitioners by this application to strike out the 's. 181 Petition'. The respondents therefore cannot presently be allowed to approbate and reprobate and move this court to strike out the 's. 181 Petition'. Infact the respondents have obtained leave of this court on 21 July 2000 to cross-examine the 1st, 2nd and 3rd petitioners in the 's. 181 Petition' and the s. 181 Petition should proceed with the continuation of the hearing.

In *S Singaram v. Fong Peck Moi & Anor* [1974] 1 LNS 144, His Lordship Ibrahim J said:

> Furthermore I was of the view that defendant should not be permitted to blow hot and cold and have a second bite of the cake. In *Broom's Legal Maxims*, 10th Edition, at page 103 it is stated that "He is not to be heard who alleges things contrary to each other." As defendant had previously maintained that he was not out of time he could not now be heard to the contrary and ask for some other remedy. The following passage from the judgment of Ong Hock Thye F.J. (as he then was) in *Natesan v. Goh Gok Hoonat* p. 8 is illustrative of the above-stated maxim:
>
> > Above everything else is the fact that the learned counsel for the appellant now sets up a case which not only is not founded upon, but contrary to, this appellant's own pleadings. We should be creating an absurd precedent to consider allowing this appeal, on any ground, without even any application for consequential amendment of the defence pleaded. Any amendment, at this stage, setting up a case which amounts to a volte-face, is naturally out of the question.

In *Permodalan Mbf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors* [1988] 1 MLJ 178 at 181, His Lordship Syed Agil Barakbah SCJ said "... where the rules contain provisions making available sufficient remedies, the Court will not invoke its inherent powers." (see *Leal v. Dunlop Bio-International Processes* [1984] 1 WLR 874).

There is no doubt that the inherent power of the court as provided under O. 92 r. 4 of the Rules of the High Court 1980 to strike out the petition for abuse of the process of the court is intact. However, this summary jurisdiction cannot be invoked at the slightest breach of the rules and without considering the factual situation of each case. On the facts in the instant case it seems to be that it will be an abuse of the inherent powers of the court to strike out the s. 181 petition.

In *CC Ng & Brothers Sdn Bhd v. Government Of State Of Pahan*g [1985] 1 CLJ 235; [1985] CLJ (Rep) 45, Seah FJ said:

> In our judgment, this is not a proper time to consider these rival submissions when the inherent jurisdiction of the Court is invoked to strike out a writ and/or a statement of claim on the ground that it was an abuse of the process of the Court. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution [per Lord Diplock in *Tractors Malaysia Bhd. v. Tio Chee Hing*]. In *Lawrance v. Norreys Lord Herschell* said words to the same effect that "It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. **It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases.** I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". In our opinion, the question posed before the learned judge ought to be decided at the trial. (emphasis by this Court)

His Lordship Augustine Paul JC (as His Lordship then was) in *Ho Yoke Kwei & Anor v. Ong Eng Hin* [1997] 1 CLJ 603 observed as follows:

> The starting point for the answer to this question is *Montreal Trust Co v. Churchill Forest Industries (Manitoba) Ltd* 4 WW 542 where the Court of Appeal of Manitoba in adopting a passage from Sir Jack Jacob's article entitled The Inherent Jurisdiction of the Court said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being a reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. In *Loo Chay Meng v. Ong Cheong Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445, VC George J (as he then was) held that **in a situation where a lacuna exists in the RHC 1980 and where the same causes a procedural injustice in that it does not provide an adequate remedy or remedies, the court is then not only entitled to fill the gap by using its inherent jurisdiction, but is obliged to do so,**

in order to avoid an injustice. (emphasis by this Court) In *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 MLJ 143, Edgar Joseph Jr J (as he then was) said that the court has jurisdiction to grant a Mareva injunction in the exercise of its inherent jurisdiction. This shows that the inherent power of the court is not confined to merely filling in gaps in the rules but extends to mould remedies where no provision is made for them in the rules. However, the inherent powers cannot be invoked to override express provisions in the rules. The limitation on the use of the court's inherent jurisdiction was laid down by the Supreme Court in *Permodalan Mbf Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah Bin Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244; [1988] 1 MLJ 178 where Syed Agil Barakbah SCJ in referring to O. 92 r. 4 of the RHC 1980, which is in *pari materia* with O. 53 r. 11 of the SCR 1980, said at p. 181:

> It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

In *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 73, the respondents through two of the affidavits cross-petitioned for relief under s. 181 of the Companies Act 1965 against the petitioners. This cross-petition by the respondents was filed in the proceedings commenced by the petitioners pursuant to a winding-up petition under s. 218 and the oppression petition under s. 181 of the Companies Act 1965. However, the petitioners objected to the course taken by the respondents as there were no such provision for cross-petition contained in the Rules of the High Court 1980. His Lordship Anuar J referred to s. 151 of the Indian Civil Procedure which is identical to O. 92 r. 4 of the Rules of the High Court 1980 and to two authorities decided by the Indian Supreme Court and to three local decisions of the High Court, Court of Appeal and the Supreme Court in reference to the ambit of the courts inherent jurisdiction. His Lordship decided that in the absence of a specific provision or specific procedural provisions in the Rules of the High Court 1980, the inherent jurisdiction could be invoked to prevent injustice. Accordingly, the respondents were allowed to proceed with the cross petition for relief under s. 181 of the Companies Act 1965 against the petitioners which was claimed in two of the affidavits.

Based on the decision in *Kumagai Gumi Co Ltd*, it is also clear that the inherent jurisdiction as provided under O. 92 r. 4 of the Rules of the High Court 1980 could only be invoked where the rules in this case, the Rules of the High Court 1980 do not contain specific provisions or procedure available to the respondents to strike out the 's. 181 Petition'. As the Rules of the High Court 1980 namely, O. 18 r. 19 expressly provides for such procedure and remedies, this Court is not agreeable to invoke the inherent powers as provided under O. 92 r. 4 of the Rules of the High Court 1980.

In *Haji Wan Habib Syed Mahmud v. Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 CLJ 115; [1986] CLJ (Rep) 149, the appellant appealed against the exercise of discretion of the High Court which had refused to exercise its discretion and one of the reasons being that there was a delay of two months in respect of an application for interlocutory injunction. On appeal, Abdul Hamid Ag LP (later Lord President) said:

> ... it will appear that the trial Judge also relied on the long delay of two months before the appellant sought relief and this delay the Judge held to be unreasonable and unexplained by the appellant. Discretionary remedies are exceptional in their nature and shall not be made available to those who sleep on their rights. See *R. v. Senate of University of Aston* and E*vercrisp Snack Products Sdn. Bhd. v. Sweeties Food Industries Sdn. Bhd*.

In *R. v. Senate Of University Of Aston* [1969] 2 All ER 964, Blain J, in refusing to exercise his discretionary powers due to the delay said:

> This court does not lightly exercise its discretion ... not only is real injustice a necessary ingredient before any application is granted, but it should, in my view be granted only where diligence is shown by an applicant in real need of remedy.

Although the facts in *Haji Wan Habib Syed Mahmud* was in reference to an interlocutory injunction which is not an application to strike out, this court is of the view that the principle involved is important where a party sits on its rights as in the instant case and that principle applies even to an application to strike out the petition under s. 181.

In *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener)* [1995] 2 MLJ 421, His Lordship Low Hop Bing JC (as His Lordship then was) observed at 430:

> ... the inherent jurisdiction of the court under O. 92 r. 4 cannot be used to deny the plaintiff of any legal right that may be vested in him under r. 7(b).

In another passage of the judgment, His Lordship said:

> I hold that the inherent jurisdiction of the court must be applied to do justice to the parties and to secure fairness in a trial between them but not for any other purpose such as taking away the substantive rights of the auctioneer in this case.

In *Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd* [1996] 2 BLJ 142, His Lordship VC George J (as His Lordship then was) observed:

> ... where there is a lacuna in the rules and practice, then and only then, may the aforesaid inherent jurisdiction be invoked.

As to invoking the inherent jurisdiction of the court, His Lordship Augustine Paul JC (as he then was) in *Ho Yoke Kwei & Anor v. Ong Eng Hin* [1997] 1 CLJ 603 observed as follows:

> The starting point for the answer to this question is *Montreal Trust Co v. Churchill Forest Industries (Manitoba)* Ltd 4 WW 542 where the Court of Appeal of Manitoba in adopting a passage from Sir Jack Jacob's article entitled The Inherent Jurisdiction of the Court said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being a reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. In *Loo Chay Meng v. Ong Cheong Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445, VC George J (as he then was) held that in a situation where a lacuna exists in the RHC 1980 and where the same causes a procedural injustice in that it does not provide an adequate remedy or remedies, the court is then not only entitled to fill the gap by using its inherent jurisdiction, but is obliged to do so, in order to avoid an injustice. In *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 MLJ 143, Edgar Joseph Jr J (as he then was) said that the court has jurisdiction to grant a Mareva injunction in the exercise of its inherent jurisdiction. This shows that the inherent power of the court is not confined to merely filling in gaps in the rules but extends to mould remedies where no provision is made for them in the rules. However, the inherent powers cannot be invoked to override express provisions in the rules. The limitation on the use of the court's inherent jurisdiction was laid down by the Supreme Court in *Permodalan Mbf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Bin Abu Samah & Ors* [1988] 1 MLJ 178 where Syed Agil Barakbah SCJ in referring to O. 92 r. 4 of the RHC 1980, which is in *pari materia* with O. 53 r. 11 of the SCR 1980, said at p. 181:
>
> > It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

In *Arab-Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773, His Lordship Gopal Sri Ram JCA delivering the judgment of the Court of Appeal observed and referred to the passage in *Dato Menteri Othman Bin Baginda & Anor v. Dato Ombi Syed Alwi Bin Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98, which was applied by our Federal Court and which reads as follows:

> When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, ie to embark upon the inquiry whether facts exist which would entitle the court to grant the relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found

a to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.

Although those words were spoken in the context of declaratory relief, they are of universal application and are analogously relevant to the present case where b a rule of court has expressly conferred a wide discretion on the court.

> ... When discretion falls to be exercised, each case turns upon its own peculiar facts and it is axiomatic that one set of facts is no precedent for another set of facts, no matter how close the resemblance between the two or more factual situations.

c In *The Motor Emporium v. V Arumugam* [1933] 1 LNS 106, Terrell, Ag. CJ observed that:

> ... every Court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements d of the social conditions of the community where the law is administered.

In *Haggard v. Pelicier Freres* [1891] AC 61 at 68, Lord Watson referred to the observation of Lord Herschell in *Lawrance v. Norreys* 15 App Cas 210 where it is stated "It cannot be doubted that the court has an inherent e jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases.

In *Remmington v. Scoles* [1897] R 242 Roma J said "The court has an inherent power to prevent the abuse of legal machinery."

f As to the delay, this court is mindful that a party wishing to strike out proceedings could do so "at any stage of the proceedings" under O. 18 r. 19 but the fact that the party is allowed to do so at any stage of the proceedings does not mean the party can sleep on its rights, insist on the petitioners to proceed with the hearing on its merits and then wake up after a long period g and during the midst of the hearing seek the indulgence of the court to strike out the petition for abuse of the process of the court where such right to apply was available to the respondents as early as in 1998 or even in 1999 or even in 2000. The words "at any stage of the proceedings", in the view of this court must be given a purposive interpretation and cannot be applied at the h 'whims and fancies' of any individual litigant though it gives the impression that there are no conditions attached. Counsel for the respondents in his persuasive submission urged this court to disregard the issues of delay, waiver and acquiescence since it is now brought to the attention of this court that there is an abuse of the process of the court by the petitioners. This court is

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of the view that this discretionary remedy is exceptional in their nature and should not be made available to those who sleep on their rights (see *Haji Wan Habib Syed Mahmud v. Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 CLJ 115; [1986] CLJ (Rep) 149).

In *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472, His Lordship Zakaria Yatim J (as he then was) said:

> The rule does not specify a time limit during which a party may apply to the Court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The Court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See The Supreme Court Practice, 1985, vol.1, page 304.
>
> Lorrain's present application to strike out the writ of summons in C 138 must be refused as the case was set down for trial on two occasions.

As to the time frame for a party to make an application to set aside any proceedings, His Lordship Augustine Paul JC (as he then was) in *Ho Yoke Kwei & Anor v. Ong Eng Hin* [1997] 1 CLJ 603 referred to O. 2 r. 2(1) of the Rules of the High Court 1980 wherein states:

> An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed **unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity**. (emphasis by this Court)
>
> As provided by the rule, the application must be made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. In *Pontin & Anor v. Wood* [1962] 1 QB 594 an application to set aside a writ for not disclosing a cause of action more than four months after service of writ was held to be not within a reasonable time. In *Fry v. Moore* [1889] 23 QBD 395 the step taken by the defendant to defend the case on the merits despite knowledge of the irregularity was held to be a **waiver**. (emphasis by this Court)

As to whether the conduct of the respondent stops him from asserting his rights, His Lordship Augustine Paul JC (as he then was) in *Ho Yoke Kwei & Anor v. Ong Eng Hin* [1997] 1 CLJ 603 said:

> Finally, I shall consider whether the conduct of the respondent estops him from asserting his rights. Knowledge of facts plays a dominant role in the law of estoppel. In *Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd.* [1985] 1 CLJ 20; [1985] CLJ (Re) 8, Lord Templeman said that it is the essence of the doctrine of election that the party electing shall be confronted with two

> mutually exclusive courses of action between which he must, in fairness to the other party, make his choice. When the respondent filed his reply and defence to counterclaim he had only one course open to him as he had no knowledge of the other. Thus the doctrine has no application on the facts of this case. With regard to the doctrine of acquiescence, the case cited by learned counsel for the appellants also requires knowledge which, as I have said, the respondent did not have. In any event the objection of learned counsel based on estoppel cannot stand as there can be no estoppel against a statute (see *Foo Loong Lithographer Pte Ltd v. Mun Hean Realty Pte Ltd* [1989] 2 MLJ 80; *Overseas Chinese Banking Corp Ltd v. Eastern Auto Co Ltd* [1961] MLJ 300 and *Chew Geok Lin v. Pau Ping Kwang* [1965] MLJ 25). For this purpose the SCR 1980 is clearly a subsidiary legislation within the meaning of s 3 of the Interpretation Act 1967 and has statutory force (see *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 MLJ 143). Accordingly, it is my v. iew that the respondent is not estopped from applying to set aside the counterclaim.

As to the delay against the respondents, this court finds that there is inordinate and unexplained delay on the part of the respondents for this application (encl. 77) to strike out the 's. 181 Petition'. On the issue of delay, Lord Blackburn said in *Erlanger v. New Sombrero Phosphate Co* [1877-78] 3 AC 1218:

> And a Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell more against the party in mora, than a similar change before he was in mora should do.

An application which easily could have been made at a much earlier stage of the proceedings is delayed till after evidence is given and a point of law argued, leave may be refused (see *James v. Smith* [1891] 1 Chancery 384). In order to decide on the issue of delay, the court must look at the whole thing on its entirety including the length of the delay, the degree of prejudice to the petitioners and the undue hardship caused to the petitioners which may give rise to a miscarriage of justice. It has been said time and time again that the Court will assist the vigilant and not the indolent (see *Yap Ban Tick & Ors v. Standard Chartered Bank* [1995] 4 CLJ 31, *Thong Kim Chea v. Thong Seng & Co Sdn Bhd & Anor* [1996] 1 CLJ 153, *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ 449).

It is clear from the conduct of the respondents and the various steps taken by them prior to filing this application to strike out is that their stand has been consistent in that they have been anxious to proceed with the 's. 181 Petition' at a speed and had impliedly abandoned their right to strike out. The respondents have not shown any reason to support their views that after having

elected to proceed on the merits of the 's. 181 Petition', they could presently and should be permitted to change their stand. The respondents' stand has been consistent and unassailable until the evidence of the 3rd respondent which came to light through the cross-examination by the petitioners' counsel where thereafter the respondents stand seemed to be helter-skelter by filing this application to strike out the 's. 181 Petition'. The conduct of the respondents seem to deviate, detract, sift and shift from their original stand by this application. The respondents are in fact asking this court to put the clock back or take a detour just for the sake of relieving them from their election to proceed on the merits which they have acquiescenced over a period (see *Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 PC Lord Templeman p. 11 and 12).

This court finds that there is a grave risk of impeding the administration of justice if this court were to condone the entire conduct of the respondents based on the chronology of events and readily grant the summary relief sought by the respondents against the petitioners and consequently, shut out the petitioners from proceeding with their rights as stipulated under s. 181 of the Companies Act 1965.

In *Re Len Chee Omnibus Co Ltd Chin Sow Lan v. Lee Chee Omnibus Co Ltd. & Ors* [1969] 1 LNS 59, Raja Azlan Shah J (as His Royal Highness then was) cited the observation of Lord Camden LC in *Smith v. Clay* [1767] 3 Bro CC 639n at 640n wherein it is said:

> ... has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing.

The observation of the Court was that:

> The applicant said that she became aware that her shares had been registered in her mother's name subsequent to her mother's death. That was in 1963. Letters of administration of her estate were granted to the last three respondents in July 1966. The present summons were taken out in December 1968. That was not done within a reasonable time after she became aware of the facts entitling her to relief. I am of the opinion that she is guilty of laches.

In *Gleeson v. J Wippell & Co Ltd* [1977] 3 All ER 54 Megarry VC observed:

> ... especially if the second proceedings have the same result as the first; but the drastic step of striking out the proceedings is quite another matter.
>
> It will be seen that I regard with considerable suspicion the marriage between RSC Ord 15 r. 6(2), and RSC Ord 18 r. 19, for which counsel for Wippell contends,

> and that I am apprehensive of the permissive provisions of the former rule being forged into a weapon which requires some parties to that the jurisdiction to strike out an indorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd (No 3) n1* established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be *res judicata*, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial. In the present case, I may say, the defence duly pleads *res judicata*. The inherent jurisdiction, too, is discretionary: see *Higgins v. Woodhall n2*, per Lord Halsbury LC.

On the facts in the instant case, the respondents have failed to satisfy this court that justice requires that this application (encl. 77) ought to be granted and that the scale should be tilted in their favour to disturb the existing state of things. Infact in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, His Lordship Gopal Sri Ram JCA for the Federal Court observed that:

> That the justice of the case should be the overriding consideration is axiomatic. After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case. And rules of court and of practice are created to facilitate the attainment of justice, not its obstruction.

In *Metropolitan Bank, Limited, And Anor v. Alexander* [1885] 10 App Cas 210 at 223, Lord Blackburn observed "I do not think that it would necessarily follow that it was to be considered frivolous and vexatious merely because there had been a previous decision unreversed and unappealed against.

In *Arab-Malaysia Finance Bhd v. Malacca Development Corporation Sdn. Bhd. & Ors.* [1997] 3 CLJ 51 at 59 His Lordship Augustine Paul JC (as he then was) said "a litigant must take responsibility for and accept the consequences of delay on the part of his solicitor. Thus there was no acceptable explanation offered by the defendants on the delay in prosecuting their counter claim. The time has come for parties to take a greater interest in litigation where they are involved. If they fail it is the responsibility of the court to wake them up."

In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & 2 Ors* [1995] 1 CLJ 461 at 483, His Lordship Hj Mohd Jemuri Serjan CJ (Borneo) observed:

> It sometimes happens one has been defrauded and the real facts are not apparent to him for years afterward then one has a reasonable time for the discovery of the alleged fraud to bring his action; but not where he knows of the alleged fraud and acquiesces in the wrongful conduct of the defendant and deliberately refuses to assert his rights until sometime afterwards when he sustains an injury.

> It is observed that the writ was originally filed on 1 April 1993, hardly two weeks after the discovery of the alleged fraud and within that short space of time perhaps, with insufficient facts to assist the solicitors to prepare the pleadings with such amplitude as to show they have a cause of action, the plaintiffs cannot be said to be guilty of unreasonable delay. The fact that a subsequent amended writ was filed on 27 May 1993 is testimony to the haste with which the original writ was prepared and filed to avoid unreasonable delay on the plaintiffs' part. We would say the plaintiffs under those circumstances had acted with due promptness, given the problems they were facing to get all the relevant information from the reluctant defendants, and are not guilty of any unreasonable delay as to defeat their claims for an interlocutory injunction.

In *Re Senson Auto Supplies Sdn. Bhd* [1987] 1 LNS 110, His Lordship Edgar Joseph Jr J (as he then was) said:

> It is settled law that delay by petitioners in initiating proceedings after they have realised that they have been victims of a scheme of oppression will induce the court to refuse itself, since this indicates that they acquiesced in the conduct complained about and their complaints are not therefore made in good faith (see *Re Jermyn Street Turkish Baths Ltd*.).
>
> In the present case, there was inordinate delay in the presentation of the petition sufficient to debar the petitioners from relief by way of an order for winding up.
>
> In all the circumstances, I had no hesitation in dismissing the petition with costs.

Chitty J in *Re Lart; Wilkinson Blades* [1896] 2 Ch 788 observed "The result is that though Mr. Wilkinson is not technically bound by the judgment, yet, having regard to his conduct, his knowledge and the circumstances of the case, I think it is contrary to good faith and to equity that he should raise this question at the present time.

In *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396, His Lordship Gopal Sri Ram JCA said:

> The delay point
>
> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim vigilantibus, non dormientibus, jura subveniunt, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
>
> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves

the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. It is a decision of the Federal Court and therefore quite plainly binds this court. There, Edgar Joseph Jr FCJ, said (at p. 36):

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O. 2 r. 2(i) of the Rules of the High Court, 1980.)

In the present case, the explanation of the fourth defendant for the delay in making his explanation is, to summarize his affidavits, that he placed the conduct of his defence in the hands of a solicitor who did little to protect his client's interests.

Is that a reasonable explanation? The learned judge did not think it was. And I agree with him. Undoubtedly, this court will not, whenever feasible, allow a client to suffer for the negligence of his solicitor: see, *Cheow Chew Khoon v. Abdul Johari Bin Abdul Rahman* [1995] 1 MLJ 457 at p 490, per VC George JCA

But there are limits to what may be done in the interests of justice. After all, justice is not only for a defaulting defendant: it is for the plaintiff as well. And at the end of the day, a careful examination of the facts and circumstances reveals that the fourth defendant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. Surely, it would be injustice to visit the consequences of his indifference upon the plaintiff's head.

There is another factor in this case which turns the scales against the defendant. In fairness to the plaintiff and its solicitors, it must be said of them that they granted to the fourth defendant's solicitors every indulgence in the matter of the delivery of pleadings. The chronology to which I earlier alluded reveals that after warning the defendants' solicitors, they waited for about 18 months before entering default judgment. It is a harsh result indeed if they are to be punished for this.

> Once the question of delay is resolved against the fourth defendant, there was little left to be argued upon the question of merits. Nevertheless, I shall examine the second issue raised by the fourth defendant.

A party who has been guilty of inequitable and unconscionable conduct can be barred from relying even on the provisions of the Limitation Act 1953 as its defence (see *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 1 CLJ 69; [1989] 1 CLJ (Rep) 219 (an appeal to the Supreme Court *vide* Civil Appeal No: 508 - 88 was withdrawn on 2 February 1994 and the appeal was struck off without any order as to costs([Coram: Gunn Chit Tuan (C.J), Eusoffe Chin SCJ and Dzaiddin SCJ (presently Chief Justice of Malaysia]).

Summarily Striking Out

The power to summarily strike out a pleading must be sparingly exercised (see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7).

The power to strike out any pleadings under O. 18 r. 19 Rules of the High Court 1980 is not mandatory but permissive and confers a discretionary jurisdiction to the court to be exercised having regard to the quality and all the circumstances relating to the offending plea (see *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General Of Trade Unions & Ors* [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218.

In *Tractors Malaysia Bhd v. Tio Chee Hing* [1972] 1 LNS 157, Lord Diplock said:

> **The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution**. Had the matter depended upon the contents of the Statement of Claim alone, their Lordships would have been loath to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the Statement of Claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. In refusing to submit the evidence to critical examination, however, the Federal Court erred in law. This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the New Action could not possibly succeed. (emphasis added)

Fletcher Moulton LJ in *Dyson v. Attorney-General* [1911] 1 KB 410 at 419 observed that "difference of law, just as differences of fact, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in chambers.

In *Alliance (Malaya) Engineering Co Sdn Bhd v. San Development Sdn. Bhd* [1974] 1 LNS 5 as regards to a prayer in an application *inter alia* to strike out a defence, His Lordship Gill CJ (Malaya), referred to the above observation of Fletcher Moulton LJ in *Dyson v. Attorney-General* [1911] 1 KB 410 at 419.

In *Lee Nyan Choi v. Voon Noon* [1978] 1 LNS 94, Lee Hun Hoe CJ (Borneo) said:

> As there are triable issues the proper course would be for the issues to be tried in the usual manner in open court. The power to dismiss an action summarily without permitting a party to proceed to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases. The present case is not one of those plain and obvious cases.

In *Pengiran Othman Shah B Pengiran Mohd Yusoff & Anor V. Karambunai Resorts Sdn Bhd (Dahulu Dikenali Sebagai Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 CLJ 257, Siti Norma Yaakob JCA (as Her Ladyship then was), presently judge of the Federal Court) said:

> The discretionary power to dismiss an action summarily under O. 18 r. 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. (see *Tractors (M) Bhd v. Tio Chee Hing* [1975] 2 MLJ 1.) Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See *McKay & Anor v. Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 WLR 890).

In *Goodson v. Grierson* [1908] 1 KB 761, Fletcher Moulton LJ observed "... But it is a serious thing to dismiss an action before it has been tried, and a clear case for doing so must be made out."

The fact that there is an inherent power does not *ex necessitate* mean the court should as a matter of course invoke the inherent jurisdiction.

It has to be made clear by this court that based on the background and chronology of events as traced by this court, this is not the case of the petitioners having failed to obtain the relief in the 's. 218 Petition' but is infact seeking "proverbial 2nd bite of the cherry". It is a clear case of the petitioners exercising their statutory right which Parliament has conferred on them two substantive rights namely the relief as provided under s. 218 and under s. 181 of the Companies Act 1965.

It is not denied that this court has undoubtedly a right in its discretion to strike out proceedings or decline to hear proceedings on the ground that there is an abuse of the process of the court. However, in the instant case, this court is unable to find any abuse which can credibly be described as an abuse of the process of the court against the petitioners. The chronology of events has shown that there was no abuse of the process on the part of the petitioners. On the contrary, this court finds that it is the respondents who have abused the process of the court by this application. This court has to protect its process from abuse to safeguard the integrity of the administration of Justice.

The respondents have also failed to show convincingly how those legal principles which the respondents' counsel has highlighted by the cases are to be applied on the facts, the circumstances and the background in the instant case in order to allow the application (encl. 77). The facts in the instant case are entirely distinguishable from the cases cited and referred to by the respondents' counsel.

This court therefore cannot prevent the petitioners from proceeding with the 's. 181 Petition' as their distinct rights and cause of action are governed by distinct rules. The doors of the court cannot be unduly shut in the face of litigants unless their actions filed in court are actuated by malice (see *Greenhalgh v. Mallard*, 1947 2 All ER 255.

The conclusions of this court are as follows:

(1) there was unreasonable delay on the part of the respondents in taking out the application to strike out. The delay has not been satisfactorily explained;

(2) the respondents have elected to proceed on the merits of the case by filing and serving affidavits in reply to the affidavits of the petitioners without any conditions attached to the filing of the application to strike out the 's. 181 Petition';

(3) the respondents have acquiesced to proceed with the cross-examination of the respondents by the petitioners' counsel on its merits. The respondents have also taken a stand to cross-examine the petitioners even after the decision by His Lordship in the 's. 218 Petition' on 19 November 1999. Consequently, the respondents have waived the right to apply to strike out the 's. 181 Petition';

(4) the prejudice and detriment that will be caused to the petitioners cannot be compensated for by costs;

(5) it is the respondents who have abused the process by filing this application to strike out after taking into consideration the background and the chronology of events in the instant case;

(6) it is important to state that in a 's. 181 Petition', the court would not readily and need not necessarily make a winding-up order if the court is of the view that some other remedy is available to the petitioners. So it is not right on the part of the respondents to contend that the court is asked to make a similar order as that sought in the 's. 218 Petition';

(7) The demands of justice would be better served if the application to strike out is refused.

Finally, on going through all the written and oral submissions, all the authorities cited and referred to by both parties although not individually dealt with in this judgment and the relevant documents and cause papers which includes further written submissions by both parties at the invitation of this court on the six cases referred to them on 15 August 2002, this court finds that this is not a suitable case to strike out the 's. 181 Petition' which is filed by the petitioners and by consent proceeded on for hearing by voir dire. This court wishes to state that some of the authorities referred to in this Grounds of Judgment were not cited by either counsel but this court took the liberty to browse through those cases in order to come to a reasoned judgment. The 6 cases referred to by this court to both the counsels were:

i) *In Re Len Chee Omnibus Co. Ltd. Chin Sow Lan v. Lee Chee Omnibus Co. Ltd. & Ors* [1969] 1 LNS 59

ii) *Hardy v. Elphick* [1973] 2 WLR 824

iii) *Gleeson v. J Wippell & Co Ltd* [1977] 3 All ER 54

iv) *Chong Choon Chai v. Tan Ghee Cheng* [1993] 3 SLR 1

v) *Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129.

vi) *Re Chong Lee Leong Seng Co (Pte) Ltd* [1989] 1 LNS 70

Accordingly, the application (encl. 77) is dismissed with costs. The 's. 181 Petition' is to proceed with the continued hearing and the cross-examination of the 3rd respondent.